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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	**WC Docket No. 02-189**
	)	
Consolidated Application for Authority to Provide In-Region, InterLATA Services in Montana, Utah, Washington and Wyoming	)	

To: The Commission

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC. IN SUPPORT OF CONSOLIDATED APPLICATION FOR AUTHORITY TO PROVIDE IN-REGION, INTERLATA SERVICES IN MONTANA, UTAH, WASHINGTON AND WYOMING

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Pursuant to the Commission's *Public Notice*, DA 02-1666 (July 12, 2002), Qwest Communications International Inc. hereby submits its Reply Comments in the captioned proceeding. 1/

I. INTRODUCTION AND SUMMARY: GRANT OF QWEST'S APPLICATION IS SUPPORTED BY THE RECORD AND COMMISSION PRECEDENT

Qwest's Application provides compelling evidence that Qwest has satisfied the requirements of Section 271 in Montana, Utah, Washington and Wyoming. Each of the four

1/ These Reply Comments are 154 pages long. The captioned application seeks in-region, interLATA authority in four states; moreover, Qwest is responding in its Reply Comments to voluminous comments filed by 13 parties, each of the four State Authorities and the U.S. Department of Justice. Qwest notes that, in addition, its Reply Comments contain information provided at the direction of FCC staff in response to inquiries propounded by staff in the course of the *ex parte* process to date. Accordingly, to the extent authorization is required, Qwest respectfully seeks leave to exceed the page limit applicable to this submission.

State Authorities agrees, and, in its respective consultative report filed in this docket, supports grant of the Application.

Comments filed in opposition to Qwest's interLATA reentry are largely a rehash of arguments considered, and rejected, by the State Authorities in the course of their Section 271 proceedings, or objections raised to Qwest's pending application in WC Docket No. 02-148 (June 13, 2002), or both. These objections failed to persuade any of the State Authorities to withhold its support for grant of Qwest's Application. They failed to establish any basis under the Act or Commission precedent for denial of Qwest's June 13, 2002 application. And they fail to overcome Qwest's showing of Section 271 compliance here.

Each of the State Authorities has determined that Qwest has satisfied the requirements of Section 271. In proceedings that were "extensive and thorough" (WUTC Comments at 7) and afforded CLECs "opportunities to participate, to present evidence, to comment, and to advocate their positions" every step of the way, PSCU Consultative Report at 1, each has concluded that the local market in, respectively, Montana, Utah, Washington and Wyoming is "fully and irreversibly open to competition." Each has advised this Commission to authorize Qwest to provide interLATA services in its state. 2/ Meanwhile, the Department of

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2/ The WPSC has found that Qwest has met the requirements for obtaining authority to provide interLATA services in Wyoming, but expressed the view in its Comments that Qwest's proposed post-entry Performance Assurance Plan ("QPAP"), "[u]nderstood in the context of Wyoming.s local service markets and the relatively small local exchange carriers competing with Qwest in Wyoming, . . . fails in several critical aspects to serve its intended purpose." WPSC Comments at 10. Accordingly, the WPSC has recommended that this Commission "decide the form the Wyoming QPAP should take, and thereupon approve Qwest's Application." *Id.* at 17. *See* Section IX.A, below.

The MPSC's endorsement of Qwest's application is subject to two "public interest" conditions: *first*, that Qwest "untie its DSL offering from its offerings of resale, loop UNEs or UNE-Ps to provide reverse line sharing," and, *second*, that Qwest submit "a full revenue requirements and rate design case." MPSC Evaluation at 7-10. Qwest has demonstrated that the MPSC's adoption of these conditions exceeds the scope of the public interest rubric and does

Justice, subject to this Commission's independent evaluation, also "recommends that the FCC approve Qwest's Application." DOJ Evaluation at 21-22. Individually and collectively, these findings by the expert agencies whose views are to be accorded "substantial weight" in the Section 271 calculus 3/ constitute additional evidence that Qwest has satisfied the requirements of the Act and that its Application should be granted.

"When considering commenters' filings in opposition to the BOC's application," the Commission looks "for evidence that the BOC's *policies, procedures, or capabilities* preclude it from satisfying the requirements of the checklist item. Mere unsupported evidence in opposition will not suffice." *Texas 271 Order*, 15 FCC Rcd at 18375 ¶ 50 (emphasis added). Furthermore, as the Commission has stated on more than one occasion, the determination of a BOC's satisfaction of the requirements of Section 271 ultimately is "a judgment we must make based on our expertise in promoting competition in local markets and in telecommunications regulation generally." *Kansas/Oklahoma 271 Order* ¶ 29; *see also Texas 271 Order*, 15 FCC Rcd at 18374 ¶ 46; *New York 271 Order*, 15 FCC Rcd at 3972 ¶ 46. The Commission expressly has eschewed the delineation of "specific objective criteria" for satisfaction of Section 271; to the contrary, because the Commission has concluded that it can meaningfully evaluate a Section 271 application only on the basis of "an analysis of specific facts and circumstances," it examines "each application on a case-by-case basis and consider[s] the totality of the circumstances, including the origin and quality of the information before us, to determine

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not, in any event, undermine the MPSC's multiple findings that Qwest has satisfied the requirements of Section 271. *See* Qwest Br. at 8 n.5, 76-77, 191-92.

3/ *See* 47 U.S.C. § 271(d)(2)(A) (directing Commission to "give substantial weight to the Attorney General's evaluation); *New York 271 Order*, 15 FCC Rcd ¶¶ 6-13, 20 (Commission will accord "substantial weight" to state evaluations that are based on rigorous underlying proceedings).

whether the nondiscrimination requirements of the Act are met." *Kansas/Oklahoma 271 Order* ¶ 29.

The comprehensive record here reflects several years, hundreds of millions of dollars, and the work of thousands of people to open local markets to competition. That record has been endorsed by the State Authorities and deemed sufficient by the Department of Justice. The Commission now should take the final step, and grant Qwest's Application.

II. THE RECORD DEMONSTRATES THAT LOCAL COMPETITION IS FLOURISHING IN EACH OF THE APPLICATION STATES

The Commission has made clear that Track A is satisfied so long as a BOC can show in each state that at least one predominantly facilities-based CLEC is "an actual commercial alternative" to the BOC – which can be done by demonstrating that the CLEC serves "more than a *de minimis* number" of subscribers. 4/

Qwest has demonstrated that CLECs are providing service predominantly over their own facilities to more than a *de minimis* number of both residential and business customers in each of the application states, and that the Track A requirements therefore have been satisfied. 5/ *See* Qwest Br. at 12-18; *see also* Teitzel Decl. at 9-30. Even in Montana and Wyoming, where CLEC market share is lower than in the other two application states, facilities-based carriers such as Mid-Rivers Telephone Cooperative, Blackfoot Communications and

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4/ *See New Jersey 271 Order* at ¶ 10; Kansas/*Oklahoma 271 Order*, 16 FCC Rcd at 6257 ¶ 42; *Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 78. In New Jersey, a CLEC serving no more than 733 residential access lines was deemed to satisfy the *de minimis* standard. *See New Jersey 271 Order* ¶¶ 11–13, n.33 & n.41. A CLEC serving no more than 345 residential lines satisfied the standard in Vermont. *See Vermont 271* Order ¶¶ 11–12; *see also DOJ Vermont Evaluation* at 5 & n.19.

5/ Access line and E-911 information associated with Independent LECs serving customers outside Qwest's service territory has been excluded from Qwest's data. Data associated with CLECs serving customers in Independent LEC service territory also were excluded.

3Rivers Telephone Corporation, Inc. (in Montana) and Silver Star Telephone Company, Inc. (in Wyoming) 6/ are actual commercial alternatives to Qwest, providing service to business and residential end users at more than *de minimis* levels. 7/ *See* Teitzel Decl. Exhibits DLT-Track A/PI-MT-1 and DLT-Track A/PI-WY-1.

Despite the claims of some commenters that CLEC market shares in the application states are inadequate to support approval under Section 271 (Sprint Comments at 10-11; AT&T Comments at 147-150), the Commission repeatedly has "specifically declined to require any particular level of market penetration." 8/ Moreover, the percentage of lines served by CLECs in each of the application states is consistent with the penetration rates in other states in which the Commission has granted Section 271 approval. *See* Qwest Br. at 178; Teitzel Decl. at 36-38.

6/ Silver Star Telephone Company, Inc. ("Silver Star") has overbuilt Qwest loop facilities and is providing local exchange services to a substantial number of business and residential customers using its own loop facilities in Afton, Wyoming. Silver Star is not yet reporting data to Intrado, Qwest's third party E-911 database administrator, for customers located in Afton. However, Silver Star does show a significant number of residential and business customer listings in Qwest's facilities-based white pages listings, which only contains listings in Qwest's white pages database associated with customers served by CLECs that serve cutomers *via* a CLEC's own switch. *See* Exhibit DLT-Track A/PI-MT; *see also generally Qwest August 1 Ex Parte Filing.*

7/ To the extent some commenters have alleged that Qwest has failed adequately to open the market to competition for residential services, CLECs serving business customers use precisely the same systems, processes and wholesale rates as those offered to CLECs serving residential customers. These commenters would have the Commission believe that Qwest has fully opened the market to competition for its profitable business customers but, at the same time, has kept the less profitable residential market closed. Of course, this simply is not the case - nor is it possible.

8/ *See, e.g., New Jersey 271 Order* ¶¶ 10, 13; *Ameritech Michigan Order*, 12 FCC Rcd at 20585 ¶ 77. The Court of Appeals for the D.C. Circuit has affirmed that the Act "imposes no volume requirements for satisfaction of Track A." *Sprint v. FCC*, 274 F.3d at 553-54; *see also SBC Communications Inc. v. FCC*, 138 F.3d at 416 ("Track A does not indicate just how much competition a provider must offer in either the business or residential markets before it is deemed a 'competing' provider.").

Even though AT&T may question Qwest's use of E-911 data to estimate CLEC line counts, AT&T Comments at 148, the fact is that other BOCs that have received Section 271 authority have used E-911 data for this purpose. And despite AT&T's claim that the E-911 data are overstated because "AT&T routinely loads all [ported] telephone numbers [including direct inward dial numbers ("DID")] into the E-911 database . . . ," AT&T Comments at 148, it is Qwest's experience that most CLECs do not report DID numbers to the E-911 database, as there is no valid reason to do so because these numbers are not capable of making outbound calls. 9/

Sprint, meanwhile, contends that "Qwest's methodology [for estimating CLEC market share] improperly inflates the CLECs' line estimates by including CLECs' high speed data lines and local lines which are not used for competitive local service . . . ." Sprint Comments at 12. Sprint specifically asserts that it "does not compete with Qwest for local voice telephone service" and indicates that the data Qwest attributes to Sprint-affiliated entities are "actually" used for Dial IP service and "some" DSL. *Id.* at 11-12. 10/ Sprint's assertions simply are beside the point. Regardless of how Sprint's customers use their access lines - that is, whether they connect a telephone to them and use them for voice, or connect a modem and use them for IP dial-up service - Sprint and Qwest are directly competing to provide the same product: a two-way, voice-grade retail access line. How Sprint packages that line does not change what it is, or the fact that it is a competitive substitute for a Qwest two-way voice-grade retail access line. The Commission's Section 271 orders have never suggested that an applicant must adjust its CLEC retail access line data to reflect the type of traffic the end user may be

9/ Similarly, Qwest, itself, reports no DID numbers to the E-911 database in view of the fact that there is no valid purpose for doing so.

10/ Notwithstanding Sprint's description of its activities, Qwest notes that Sprint has *self*-reported residential and business access lines to the Washington E-911 and white page listings databases. *See* Teitzel Decl. Exhibit DLT-Track A/PI-WA-1.

sending over (or the type of equipment that may be connected to) the line at any given moment, especially since the same access line can be used for both voice and data at different times during the same day.

Sprint also asserts that Qwest is "double counting" access lines by reporting access line estimates based on interconnection trunks and resold lines. Sprint Comments at 13. But, because interconnection trunks are used by CLECs only in conjunction with stand-alone unbundled loops and CLEC-owned lines served *via* a CLEC's switch, in order to estimate the total number of CLEC access lines it is necessary to look separately to the number of resale lines served by CLECs – as well as the number of UNE-P lines in service – that remain resident in a Qwest switch. *See* Teitzel Decl. ¶ 36. There is no "double counting" because interconnection trunks are not used to provide resale (or UNE-P) service.

The Track A requirements have been satisfied in Montana, Utah, Washington and Wyoming because, in each state, CLECs are providing service predominantly over their own facilities to more than a *de minimis* number of both residential and business customers. No commenter has offered any evidence to refute this conclusion.

III. QWEST'S PERFORMANCE MEASURES AND DATA ARE ACCURATE AND RELIABLE

A. Independent Reviews Verified that Qwest's Performance Data are Accurate and Reliable

Over the last two years, Qwest's performance has been scrutinized beyond that experienced by any other BOC. Liberty Consulting and CapGemini audited Qwest's performance tracking and reporting processes and found them reliable, and Liberty and KPMG validated Qwest's performance results in data reconciliation. The facts support their conclusions. Nonetheless, AT&T and Covad contend that Qwest's performance data is unreliable. *See* AT&T Comments at 47-49; Covad Comments at 42-45. In prior Section 271 orders, the Commission rejected similar attacks on the reliability of performance data.

In the *Georgia/Louisiana* proceeding, commenters raised many of the same points raised here. Specifically, the commenters asserted that:

> A number of metrics were not calculated properly; the metric data is not an accurate representation of BellSouth's performance; BellSouth's metric data is not provided in a manner that allows competing carriers to readily verify whether BellSouth's performance is meeting established standards; . . . and the lack of a completed audit, and the problems found by KPMG in its Georgia and Florida audits of BellSouth's metric data, demonstrate that the data is unreliable.

Georgia/Louisiana 271 Order ¶ 17 (citations omitted). The Department of Justice also expressed concerns about "the reliability and accuracy of BellSouth's data." *Id.*

The Commission disagreed. "In view of the extensive third-party auditing, the internal and external data controls, the open and collaborative nature of metric workshops . . . , the availability of raw performance data, BellSouth's readiness to engage in data reconciliations, and the oversight of the [state] Commissions, we are persuaded that, as a general matter BellSouth's performance metric data is accurate, reliable, and useful." *Id.* ¶ 19. The same reasoning applies here. Indeed, Qwest's case is even stronger.

None of the BellSouth audits were complete at the time the Commission issued its ruling, and certain exceptions were unresolved. *See id.* ¶ 16. In contrast, both of Qwest's performance measure audits are complete, and there are no open issues. BellSouth expressed a willingness to undergo data reconciliation. Qwest, on the other hand, participated in a thorough data reconciliation process, and Liberty closed every exception and observation report that it issued. The Department of Justice did not express any concerns about the accuracy of Qwest's performance data in its comments.

For these reasons, the Commission should reject the allegation that Qwest's performance results are not reliable. Qwest's commercial data are "sufficiently reliable for purposes of conducting [a] section 271 analysis." *Id.* ¶ 20.

1. The Performance Measurement Audits Validated Qwest's Data Collection Processes for all PIDs

AT&T's only criticism of the Performance Measurement Audits ("PMAs") is that they did not validate the accuracy of Qwest's raw data. The simple answer is that Liberty addressed the accuracy of raw inputs in data reconciliation, which is discussed below.

Moreover, in prior Section 271 decisions the Commission has not required auditing of raw data inputs. In the New York and Texas Section 271 orders, the Commission relied on evidence like the audits in this proceeding and found that commercial performance data were accurate and reliable. In the New York decision, the Commission noted that each performance metric had a clearly articulated definition, which set forth the manner in which the data were collected, and would "help to ensure that the reporting mechanism provides a benchmark against which new entrants and regulators can measure performance overt time to detect and correct any degradation of service rendered to new entrants." *New York 271 Order* ¶ 438. The New York commission, like the auditors in this case, "independently replicated Bell Atlantic's performance reports from raw data submitted by Bell Atlantic." *Id.* ¶ 442. The FCC found that these facts, and a "forum for ongoing modification and improvement of performance results," provided the requisite indicia of reliability. *Id.* at ¶ 438.

The Texas order was based on virtually identical evidence. The Commission required only that "the raw data be stored in a secure, stable and auditable file." SBC also relied upon the fact that Telcordia had "verified" its "data collection methods and procedures" and "confirmed that SBC collects and reports data in a manner consistent with state approved business rules." *Id.* ¶ 429.

The Liberty and CapGemini PMAs meet those standards. They validated that Qwest tracks performance data in conformance with the negotiated PIDs, analyzed data to "verify the complete and accurate functioning of the data capture, security, processing, analysis, and reporting processes audited," and performed independent calculations to "corroborate the adequacy of processes that measure performance against explicit standards." *See* Attachment 5, Appendix D, Liberty PMA Final Report at 1 (September 25, 2001).

The Liberty PMA also recommended ongoing review and audit of the PIDs to ensure that Qwest's performance data remains accurate and reliable. *Id.* at 135-144. That led to the development of provisions in Qwest's performance assurance plans requiring six-month reviews of performance and ongoing audits and data reconciliation. In addition, the parties are negotiating a long term PID administration plan to be administered by the ROC. These independent reviews guarantee that Qwest's performance data are, and will remain, reliable.

2. Data Reconciliation Confirmed Once and For All that Qwest's Performance Data are Accurate and Reliable.

Unlike other BOCs, Qwest requested data reconciliation to validate that its raw data inputs and performance reporting processes are accurate and reliable. Nonetheless, AT&T and Covad complain that the reconciliation did not go far enough.

AT&T's first complaint, that the data reconciliation was "limited in scope," is nonsense. AT&T Comments at 47. The CLECs, not Qwest, selected the metrics, products, and states to be reviewed in data reconciliation. AT&T itself agreed that data reconciliation should begin with a CLEC identifying "the particular performance measurement in question and the evidence that led the CLEC to conclude that a discrepancy exists." *See* Attachment 5, Appendix D, Liberty Final Report on Data Reconciliation at 4 (April 19, 2002).

AT&T also complains that Liberty reconciled performance data that are now a year old. AT&T Comments at 47-48. The reconciliation effort began in early September 2001, just after Qwest had released its July 2001 performance data. Thus, the reconciliation was based on the most current data available at the time. The reconciliation process took roughly eight months to complete. If the parties attempted to reconcile more recent data, the process would take months to complete - and AT&T would again complain about stale data. This creates a "Catch-22" problem.

AT&T's desire for military style testing raises similar problems. *Id.* at 48. To achieve that end, after Qwest fixed a problem identified in data reconciliation, the parties would have to wait several months to develop a new data sample to assess whether the fix worked. Liberty, in turn, would have to conduct another round of reconciliation. If any continuing or new problems were discovered, the parties would have to start the process all over again. This approach would result in a never ending, and unnecessary, cycle of data reconciliation as a prerequisite to Section 271 approval.

Liberty carefully reviewed the remedial measures Qwest implemented before closing the one exception and 13 observation reports issued in data reconciliation. Seven of these reports related to "process or system-type matters." Liberty verified that Qwest corrected these errors through "computer programming or revised data collection methods." 11/ The other observations arose, at least in part, from slight incidences of human error. As to each of these

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11/ Liberty Final Report on Data Reconciliation at 8. *See also id.* at 10-11 (Exception 1046 and Observations 1026, 1027), 12 (Observations 1029, 1030), 17 (Observation 1035), 19 (Observation 1038).

observations, Liberty reviewed Qwest's training materials, conducted interviews of Qwest employees, and used its own professional judgment in finding that Qwest's corrective actions would resolve any problems. 12/ "[N]one of the human-error issues . . . caused Liberty to believe that Qwest's current performance reporting could not be relied upon as a measure of Qwest's actual performance." *Id.* at 9. Liberty also concluded that Qwest "has reasonable processes in place to self-check its performance reporting and to correct problems found."*Id.*

AT&T also asserts that Liberty improperly "placed the burden [of proof] on the CLECs to prove that Qwest's data were inaccurate." AT&T Comments at 47. Liberty's final report dealt with this allegation head-on, and Liberty concluded that any arguments related to an improper study objective should be brushed aside. Liberty Final Report on Data Reconciliation at 3-4.

In sum, Qwest's performance data are "sufficiently reliable for purposes of conducting [a] section 271 analysis." *Georgia/Louisiana 271 Order* ¶ 20.

B. Qwest Accurately Processes Orders Handled Manually

Commenters allege that Qwest makes errors on 15% of orders that it processes manually. *See, e.g.*, AT&T Comments at 42. This argument is based on improper extrapolation from a sample of only 76 disparate sub-sets of orders reviewed by KMPG. Qwest's audited and reconciled performance results show that it can and does timely provision orders requiring manual handling.

12/ *Id.* at 8-9. *See also id.* at 11-12 (Observation 1028), 13-16 (Observations 1031-34), 16-19 (Observations 1036-37). The details of these observation reports, and Liberty's decisions to close them, are addressed in the Reply Declaration of Michael G. Williams ("Williams Reply Decl.") ¶¶ 26-35.

In the data reconciliation effort, Liberty analyzed over 10,000 unbundled loop and interconnection trunk orders and unbundled loop repair tickets. Virtually all of these orders had a manual processing component. Liberty issued seven observations that involved slight incidences of human error. These observations showed that Qwest's rate of human error was well below 15%, was within the zone of reasonableness one would expect for humans, and often skewed the results in favor of CLECs. *See* Williams Reply Decl. ¶ 39. More importantly, none of the commenters adduced any evidence that these human errors actually caused harm to CLECs by delaying an order or otherwise making it difficult for CLECs to process orders. 13/

C. Qwest's Commercial Performance Meets the Standards Established by the PIDs

At this point, the record includes six months of relevant commercial performance data, from February through July 2002, for each of the application states. 14/ The results over that period unequivocally show that Qwest is providing interconnection and access to network elements on a nondiscriminatory basis.

Although commenters raised concerns about isolated instances in which Qwest failed to achieve the performance standard under a few metrics for a few products, they ignored the standard of review applied to commercial performance. For example, Covad focused on line sharing repairs, which account for a tiny fraction of CLEC unbundled loop activity, but completely ignored Qwest's overall loop performance. Covad Comments at 42-43. The

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13/ AT&T asserts that manual processing, "by nature, increases the likelihood of delays and errors in provisioning," but does not show any examples of discriminatory delays caused by human errors. AT&T Comments at 42.

14/ Qwest included the results for February through May in Attachment 5, Appendix D to its Application. Qwest submitted the results for June and July in *ex parte* submissions on July 24 and August 20, respectively. Performance in each month is relevant because it occurred before comments were due on August 1, 2002. *See, e.g., Maine 271 Order* ¶ 8 n.19.

Commission has repeatedly held that, for each checklist item, it reviews "the performance demonstrated by all the measurements as a whole. Accordingly, a disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist." *New Jersey 271 Order*, App. C ¶ 9. When viewed under that standard, Qwest's performance results are more than satisfactory.

Item 1 - Interconnection and Collocation. None of the commenters raised any serious concerns about Qwest's commercial performance with regard to interconnection or collocation. This is hardly surprising. For example, for interconnection, Qwest met every performance standard in Utah during the entire six-month period. Williams Reply Decl. ¶ 43. In Wyoming, Qwest failed to achieve parity under metric MR-8, the trouble rate, in March, but the CLEC trouble rate was only 0.05% in that month. Qwest met every other performance standard in Wyoming in every other month. *Id.* In Montana, Qwest met the performance standards for every metric in every month, with two minor exceptions: (1) Qwest failed to achieve parity under OP-4, the average installation interval, in February, but there was only one CLEC installation in that month; and (2) the CLEC trouble rate was higher than retail in February and April, but the six-month average difference between wholesale and retail was only 0.01%. *Id.* In Washington, the only performance standard that Qwest missed more than once was OP-4, but Qwest achieved parity in three of the last four months and the six-month average difference between wholesale and retail was less than one day. *Id.* Call blockage on interconnection trunks was virtually nonexistent in every state. *Id.*

For collocation, Qwest's track record is perfect. Whenever it had data to report, Qwest met the performance standards for collocation forecasts and installations in every month in each state. *Id.* ¶ 44.

Item 2 - OSS. Qwest's performance with regard to gateway availability, pre-order response times, LSR rejection notice intervals, timely firm order confirmations, jeopardy notifications, work completion notifications, LSR accountability, timely release notifications, and stand-alone test environment accuracy has been impeccable. With three isolated and minor exceptions, Qwest did not miss any performance standard more than once in the last six months, in any state, for these services. 15/

Commenters ignored that performance and focused instead on reject rates, flow-through, and billing. *See, e.g.,* AT&T Comments at 41-47. With regard to rejection notices under diagnostic metric PO-4, AT&T asserts that Qwest's systems reject nearly one-third of all orders submitted electronically, but ignores that the vast majority of rejected CLEC orders are properly rejected due to CLEC errors. Williams Reply Decl. ¶ 47. Several CLECs with a significant volume of orders have reject rates in the 10-15% range for orders that were auto-rejected, which demonstrates that Qwest's systems are capable of processing correct orders. 16/ AT&T makes no attempt to quantify the alleged adverse effect of improper rejection notices, and relies instead on an assertion that rejections delay provisioning and increase CLEC costs. AT&T Comments at 42 and Finnegan/Connolly Decl. ¶¶ 164-67. Bald assertions do not rebut Qwest's

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15/ Williams Reply Decl. ¶ 45. The three exceptions were (1) PO-5C-(a), FOCs on time for manually processed resale orders in Utah, but the volume of activity was low, the six-month average of 85.37%was close to the 90% benchmark, and Qwest met the benchmark in every month in the other states; (2) PO-6B, work completion notification timeliness in Wyoming, but the six-month average was well below the six hour benchmark; and (3) PO-9B, timely jeopardy notices in Utah for unbundled loops and number portability, but the disparity is not competitively significant because the number of jeopardy notices is a small fraction of the total number of loops provisioned, and Qwest consistently met a very high percentage of its installation commitments in Utah.

16/ *See* August 23, 2002 Qwest confidential *ex parte* submission, which shows results for individual CLECs under metrics PO-4A (GUI interface) and PO-4B (EDI interface) from February through July.

prima facie showing of compliance with Section 271. Moreover, Qwest met the 18-second benchmark for issuing auto-rejects in every state in each of the last six months, with average intervals of less than 10 seconds. Williams Reply Decl. ¶ 47. Because Qwest notifies CLECs of errors almost immediately, it is highly unlikely that rejection notices significantly delay provisioning for properly submitted orders.

Commenters also complained about Qwest's flow-through rates under diagnostic metric PO-2A. *See, e.g.*, AT&T Comments at 42. They ignored that, in prior Section 271 orders, the Commission has placed little weight on flow-through, particularly when, as in this case, the BOC "demonstrates that it provides timely order confirmation and reject notices." *Georgia/Louisiana 271 Order* ¶ 143. The commenters also ignored that the Commission has consistently acknowledged that CLECs affect flow-through rates, and has looked at individual CLEC results to determine whether a BOC's systems are capable of flowing through orders. *Id.* ¶ 145. In the application states, individual CLECs have achieved overall flow-through rates in the range of 70-90%. 17/

Finally, the commenters ignored that the Commission places more emphasis on results under the "achieved flow-through measure," in this case, PO-2B. *New Jersey Section 271 Order* ¶ 132. Qwest's performance under PO-2B has been strong. In Montana, Qwest missed the applicable benchmark more than once for only three submetrics: (1) PO-2B-1 (GUI interface), local number portability ("LNP"), but the six-month CLEC average was above the benchmark; (2) PO-2B-2 (EDI interface), POTS resale, but the six-month CLEC average was above the benchmark; and (3) PO-2B-2, UNE-P POTS, but Qwest met the benchmark in four of

17/ *See* August 23, 2002, Qwest confidential *ex parte* submission showing results for individual CLECs under metrics PO-2A-1 (GUI interface) and PO-2A-2 (EDI interface) from February through July.

the last six months and the six-month average (85.96%) was close to the benchmark. Williams Reply Decl. ¶ 49. In Utah, Qwest missed the benchmark more than once for PO-2B-1, LNP, and for PO-2B-2, POTS resale, but in both cases the volume of CLEC activity was low and individual CLECs achieved flow-through rates above the benchmark. *Id.* In Washington, Qwest missed the benchmark more than once for PO-2B-1, unbundled loops, and PO-2B-2, UNE-P POTS and POTS resale, but in each case the six-month average was above the benchmark. *Id.* Finally, in Wyoming Qwest missed the benchmark more than once for only three submetrics: (1) PO-2B-1, POTS resale, but the six-month average (89.6%) was very close to the benchmark; (2) PO-2B-1, unbundled loops, but there were only five CLEC orders over the entire six months; and (3) PO-2B-2, UNE-P POTS, but the six-month average was above the benchmark. *Id.*

For billing, Qwest consistently met the performance standards for metrics BI-1A, BI-1B, BI-2, and PO-7 in each state. *Id.* at ¶ 50. Qwest met the parity standard for billing accuracy, metric BI-3A, in five out of the last six months in Wyoming. In Montana, wholesale performance dipped in April and May, but Qwest achieved parity in the last two months with a 99% accuracy rate for CLEC bills. In Utah, Qwest achieved parity in three of the last four months, with a CLEC accuracy rate of 99% to 100% in each month. In Washington, although Qwest missed the parity standard three times, the accuracy rate for CLEC bills was between 97% and 99% in five of the six months. *Id.*

Qwest met the parity standard for BI-4A, billing completeness, in five out of six months in Washington, with a six-month CLEC average of 99%. In Montana, wholesale performance has steadily improved. Qwest achieved parity in the last two months with a CLEC bill completeness rate of more than 99% in each month. In Utah, although Qwest missed the parity standard four times, the six-month CLEC average (97.6%) was only 0.86% below retail performance. Similarly, in Wyoming, although Qwest missed parity three times, the six-month CLEC average (98.5%) was only 0.39% short of retail. *Id.* ¶ 51. Viewed as a whole, these results demonstrate that Qwest is providing nondiscriminatory access to its OSS.

UNE-P. Qwest's performance in provisioning UNE-P POTS, UNE-P Centrex, and UNE-P Centrex 21 to CLECs has been outstanding. With one minor exception, Qwest did not miss any provisioning standards more than once in the last six months. *Id.* ¶ 52. Qwest's performance under metric OP-3, the percentage of installation commitments met, was particularly strong. In the no dispatch category, which accounts for most UNE-P installations, Qwest consistently met 98% to 100% of its commitments to CLECs. Across all product and dispatch disaggregations, Qwest achieved parity in every month under OP-3 in Montana, Utah, and Wyoming, and in nearly every month in Washington, with percentages generally in the 95% to 100% range. *Id.*

CLEC trouble rates for UNE-P averaged about 1% across all states and products. For UNE-P POTS, CLEC trouble rates were at parity with retail in each month in Utah, Washington, and Wyoming, and in five out of six months in Montana, where the six-month CLEC average was lower than retail. Although there were multiple disparities for UNE-P Centrex in Washington and Wyoming, the six-month average differences between wholesale and retail trouble rates were only 0.29% and 0.69%, respectively. Similarly, although there were multiple disparities for UNE-P Centrex 21 in Utah and Washington, the six-month CLEC averages were within 0.27% and 0.23% of retail. *Id.* ¶ 53. These small disparities are not competitively significant.

Qwest's performance in clearing out of service reports within 24 hours (MR-3), clearing all troubles within 48 hours (MR-4), and its mean repair intervals (MR-6) was excellent.

With one minor exception, Qwest did not miss parity more than once under any metric in any state for any product. *Id.* ¶ 54. Repeat trouble rates (MR-7) likewise have generally been at parity. *Id.* In Utah, Qwest had multiple disparities for UNE-P POTS, but achieved parity in three of the last four months in the dispatch category, and in two of the last three months in the no dispatch category. In Washington, Qwest had multiple misses in the no dispatch category for each UNE-P product. For UNE-P POTS, the six-month average difference between wholesale and retail was about 6%, roughly a handful of additional wholesale repeat troubles per month. That slight disparity is not competitively significant. For UNE-P Centrex and UNE-P Centrex 21, Qwest achieved parity in three of the last four months, with very low volumes of CLEC activity. *Id.*

Qwest consistently met its repair appointments with CLECs. In Montana, Washington, and Wyoming, Qwest achieved parity under metric MR-9, which measures the percentage of appointments met, in virtually every month for every product and dispatch disaggregation. In Utah, Qwest achieved parity in nearly every month for UNE-P POTS, no dispatch, UNE-P Centrex, dispatch and no dispatch, and UNE-P Centrex 21, no dispatch. For UNE-P POTS, dispatch, Qwest's performance has gradually improved. Qwest achieved parity in two of the last four months, and the CLEC average over those months (89%) was close to retail (93.5%). For UNE-P Centrex 21, Qwest met parity in three of the last five months, but CLEC volumes were very low, and Qwest would have achieved parity in every month had it met two or three more appointments per month. These slight disparities are not competitively significant. *Id.* ¶ 55.

Item 4, Unbundled Loops. No commenter seriously questioned Qwest's overall unbundled loop performance. For analog and 2-wire non-loaded loops, which account for the vast majority of CLEC loops provisioned, Qwest met the applicable performance standards for each metric in each state in virtually every month. *Id.* ¶ 56. For example, in each state Qwest consistently met 98% to 100% of its installation commitments to CLECs (OP-3). The only performance standard that Qwest missed more than once occurred in Montana and was not competitively significant. For 2-wire non-loaded loops, Qwest missed the parity standard for the mean repair interval (MR-6) twice, but the volume of CLEC repairs was low and the six-month CLEC average interval was less than three hours. *Id.*

Covad argues that Qwest's line sharing repair performance is unacceptable. Covad Comments at 42-43. To begin with, Covad ignores Qwest's installation performance, which is quite good. In each state with results, Qwest did not miss any installation performance standard more than once in the last six months. Williams Reply Decl. ¶ 57. On the repair side, although CLEC volumes were low, Qwest did not miss any repair performance standards in Montana or Wyoming. *Id.* In Utah and Washington, the only trouble spots were MR-4, the percentage of troubles cleared within 48 hours, and MR-6, the mean repair intervals. Of these two metrics, the key here is MR-6, because if average repair intervals are at parity, Qwest is not discriminating against CLECs. Although Qwest had multiple misses under MR-6 in the dispatch category in Utah and Washington, in each case the six-month average CLEC interval was shorter than retail. In the no dispatch category, Qwest also had multiple misses in Washington, but CLEC volumes were low, Qwest achieved parity in three of the last five months, and the six-month average disparity was only four hours. Moreover, Qwest expects the gap to close because in August it began designating all line sharing trouble reports as "out of service," which will give them the highest priority in the repair cue. *Id.*

Items 5-13. No commenters raised serious concerns about Qwest's commercial performance with respect to any of these checklist items. The only performance standards that Qwest missed more than once in any state were (1) the trouble rate for UDIT DS1 (checklist item 5) in Utah, but the six-month average difference between wholesale and retail was only 0.75%; (2) the installation quality metric for UDIT DS1 in Washington, but the CLEC volume was low and Qwest met parity in three of the last four months; (3) the trouble rate for UDIT above DS1 in Utah, but the CLEC volume was low and Qwest achieved parity in four of the last five months; and (4) the trouble rate for UDIT above DS1 in Washington, but Qwest met the parity standard in each of the last four months. *Id.* ¶ 58. As a whole, Qwest's performance with respect to checklist items 5-13 has been excellent.

Item 14 - Resale. AT&T alleges that provisioning intervals for CLEC resale orders are longer than retail intervals. AT&T Comments at 44. The facts belie that assertion. For all 12 resale products that Qwest tracks, instances of statistically significant performance disparities have been few and far between. The only installation metrics as to which Qwest missed parity more than once in the last six months were (1) average installation interval for Qwest DSL, no dispatch, in Utah, but CLEC volumes were low and the six-month CLEC average interval was shorter than retail; and (2) new service installation quality in Washington for business, Centrex, and DS1 resale, but there were no more than three CLEC installations in the months that Qwest missed for Centrex and DS1, and the six-month CLEC average for business resale was only 3.7% below retail. Williams Reply Decl. ¶ 59.

On the repair side, Qwest's performance was equally strong. The only problematic metric was MR-8, but in nearly every instance of multiple disparities, the difference between wholesale and retail was not competitively significant. In Montana, retail trouble rates were lower than wholesale by a statistically significant margin more than once for ISDN Primary resale, but the six-month CLEC average trouble rate was within 0.52% of retail. *Id.* ¶ 60. In Utah, there were multiple disparities for business resale, but the six-month average difference between wholesale and retail was only 0.32%. Qwest also had more than one miss for DS1 resale, but that accounts for a small percentage of all resale lines in service, and the six-month average disparity was only 1.83%. *Id.* In Washington, there were multiple misses for business, Centrex, and ISDN Primary, but the six-month average differences between wholesale and retail business trouble rates were only 0.22%, 0.16%, and 0.49%. *Id.* In Wyoming, the six-month average trouble rate for Centrex resale was only 0.59% higher than retail. *Id.* These small differences do not put CLECs at a significant competitive disadvantage.

Overall, Qwest's commercial performance clearly satisfies the requirements of Section 271. The performance results demonstrate that Qwest is providing interconnection, access to unbundled network elements, and resale in a nondiscriminatory fashion to CLECs.

D. Qwest's Held Order Policy Does Not Skew The Performance Results

Covad asserts that Qwest's new build policy masks Qwest's delays in filling orders, because competitors' held orders are excluded from several provisioning metrics. Covad Comments at 44-47. Furthermore, Covad mistakenly claims that Qwest is not reporting all orders that go into held status. *Id.* AT&T likewise complains that the policy has a profound impact on several metrics. AT&T Comments, Finnegan Decl. ¶¶ 119-29. The facts belie these claims.

To begin with, the number of CLEC orders delayed due to lack of facilities is extremely small. A snapshot review of Qwest internal regional data for June 2002 showed that more than 99% of CLEC inward orders for unbundled loops were fulfilled. AT&T's

hypothetical assumption that 10% of all orders cannot be filled due to a lack of facilities is a gross exaggeration. *Id.* ¶¶ 122-24.

Although commenters would like to hold Qwest accountable, in its provisioning performance results, for CLEC requests that require Qwest to build new facilities, that position is legally untenable. In Montana, Utah and Wyoming, Qwest generally is not required to build new facilities for CLECs. 18/ Thus, it is perfectly reasonable to cancel orders that would require new construction. In Washington, Qwest must treat CLEC requests for facilities in areas served by like facilities used to full capacity the same as Qwest treats requests from retail customers is those areas. Washington Commission *28th Supplemental Order* ¶ 22. Although the commenters dispute Qwest's view on the "obligation" to build, the Commission has made clear that it will not deny a Section 271 application based on disputes over the precise scope of a BOC's obligation to build, if any. *Pennsylvania 271 Order*, 16 FCC Rcd at 17469-70 ¶ 91.

Nonetheless, to allay CLEC concerns about its held order policy, Qwest added to its Montana SGAT an 11-step process, applicable to all UNEs, that includes a 30 business day hold period. Qwest is in the process of incorporating this language, which Covad approved, into the SGATs of every state in its region. *See* Reply Declaration of Karen Stewart ("Stewart Reply Decl.") at 3. Under this process, for example, Qwest holds requests for unbundled loops when no facility exists (unless the CLEC requested a loop to provide an end user with primary voice grade service that would fall under Qwest's POLR or ETC obligations or the request is in Washington and meets the requirements for building under the WUTC order). After a thorough exploration of alternatives to provide a facility for these loops, Qwest places these orders in an

18/ As part of its retail obligations, Qwest may have an obligation to build under Provider of Last Resort ("POLR") or Eligible Telecommunications Carrier ("ETC") obligations. In those cases, Qwest allows CLECs to step into the shoes of retail customers.

"Unbundled Loop Pending Facility" status for 30 business days. In Washington these orders remain in the "Unbundled Loop Pending Facility" status unless or until the CLEC cancels the order. During that period, the order is reported under OP-15, Interval for Pending Orders Delayed Past Due Date, until a new due date is established. 19/

Covad also questions the June 2002 results reported for OP-15 in Washington. It is apparent from Covad's description of the issue that it has misunderstood the language of the PID and the requirements of the Washington order. *See* Williams Reply Decl. ¶¶ 66-70.

E. Metric OP-5 Accurately Tracks Qwest's Installation Quality

Covad claims that results reported under under OP-5 are unreliable and that Qwest is incapable of reconciling data within OP-5. Covad Comments at 52. Qwest calculates OP-5 according to the PID definition, which calls for counting orders in the denominator and trouble tickets in the numerator. Qwest could easily provide the orders and trouble tickets contained in OP-5 each month. Data reconciliation could therefore be accomplished, as with any provisioning or repair measurement, comparing Qwest's OP-5 orders and trouble tickets for the relevant time period to CLECs' orders and trouble records for the same time period. Although the parties chose not to do this with OP-5, it could have been and can be done. It would, however, require the CLEC to produce similar order and trouble ticket information for comparison. Covad was incapable of providing such comparable information. Thus, during data reconciliation it was decided that OP-5 would not be reconciled.

19/ AT&T's assertion that OP-15 has a parity standard, AT&T Comments, Finnegan Decl. ¶ 122, is wrong. The ROC TAG, after extensive discussion and consideration, agreed to designate OP-15 as a diagnostic metric. This decision was reached collaboratively, without resort to impasse or escalation.

Results from other aspects of the data reconciliation support the results in OP-5. As to the OP-5 numerator, Liberty found that Qwest can and does properly identify and account for trouble tickets. When Liberty was focused on MR-6 (Mean Time to Restore) there were no instances where AT&T identified a trouble report when Qwest did not also identify the same trouble ticket. As to the OP-5 denominator, Liberty also found that Qwest properly identifies orders. While there were some differences between the parties on the number of orders that Qwest should exclude from the performance measures, the parties did not contend, and Liberty never issued an Observation finding, that Qwest was losing orders. Thus, as to the two key aspects of OP-5, Liberty did reconcile Qwest's ability to collect and report the information.

Liberty also audited OP-5 during its performance measurement audit and concluded that the measure generates accurate and reliable results. Thus, both the audit and reconciliation support Liberty's conclusion that OP-5 data are accurate and reliable. *See* Attachment 5, Appendix D, Liberty PMA Final Report.

Eschelon questions the accuracy of Qwest installations and the adequacy of Qwest's reporting on the quality of new installations, implying that Qwest's reported results for OP-5 are incomplete. Eschelon comments at 7. In fact, the PID is very clear in its description of what Qwest must report: "new order installations that were free of trouble reports." Metric OP-5 was designed to capture only situations in which trouble tickets are issued. When a CLEC reports a problem with a line or feature not indicated on the order, Qwest does not issue a trouble ticket.

Qwest recently installed a new tracking process to measure these instances and began reporting this additional information in the July results. Examination of the results for this "Service Order Accuracy" tracking tool refutes Eschelon's assertion that Qwest has a serious problem with service order accuracy affecting installation quality. The new data being reported are based on customer calls reporting service order accuracy problems to Qwest's service delivery centers within the reporting month of order completion. The results are reported on a statewide aggregate basis for all products listed in the OP-5 PID, providing an overall estimate of service order accuracy. The results are calculated using the same base of orders as OP-5, *i.e.*, denominator consisting of average of current and previous months' order volumes. In July, the first month with reported results, more than 99% of the orders issued in the Montana, Utah, and Washington states were error free. 20/ In Wyoming, 97% of the 375 orders processed were error free. Wyoming Commercial Performance Results at 86. Furthermore, in an *ex parte* submission on August 20, 2002, Qwest provided data showing that in the four application states, manually processed service orders were 95.3% to 98.7% accurate. *See* Ex Parte 082002 166. These new data, coupled with implementation of PO-20, the Manual Service Order Accuracy PID, and Qwest's pending requests in each application state to include PO-20 in Qwest's Performance Assurance Plan, 21/ should allay any lingering concerns about Qwest's commitment to providing accurate service orders for new service installations.

F. Qwest Properly Categorized Eschelon's UNE-Star Lines As UNE-P

Eschelon asserts that "Qwest is already reporting Eschelon's UNE-E/UNE-Star lines as UNE-P lines" in Qwest's performance results. Eschelon Comments at 39. Eschelon further contends that Qwest failed to provide the requisite notice for this change, which occurred "in approximately November of 2001." *Id.* at 40.

20/ Montana Commercial Performance Results at 89; Utah Commercial Performance Results at 100; Washington Commercial Performance Results at 101.

21/ Qwest filed these requests with the State Authorities on August 19, 2002. *See* Section IX.A, below.

"UNE-Star" is an informal name given to various forms of UNE-P combinations offered to CLECs. The product title, "UNE-Star," does not appear in the PIDs. UNE-Star refers to services offered on a UNE-P basis that include business POTS-type, Centrex-type, and Centrex 21-type services. 22/

Performance measurement reporting changes are not within scope of CMP and are not governed by CMP guidelines requiring advance notification. 23/ Nonetheless, Qwest documents changes in results reports in a monthly "Summary of Notes" published shortly after each month's performance results are posted on Qwest's external website. This website contains the latest performance results and the related notes summary. *See* www.qwest.com/wholesale/results/roc.html. Qwest notifies all ROC TAG participants *via* email that the results and notes have been posted to this website. Qwest notified CLECs of the change in results reporting from business lines to UNE-P in the Summary of Notes published with October 2001 results. Williams Reply Decl. ¶¶ 79-81.

G. The Commission Should Reject AT&T's Request for Additional PIDs

AT&T argues that the Commission should require Qwest to add additional PIDs, as recommended by KPMG. AT&T Comments, Finnegan Declaration on Performance Data and Assurance Plans at 47-53. This argument has no merit. The Commission confronted an identical concern raised by AT&T in New York. There, the Commission held that "[w]e disagree with commenters who suggest that additional metrics must be added . . . , and note that the New York

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22/ Centrex services involve dedicated common blocks and network access registers (NARs), whereas Centrex 21 services involve shared common blocks and NARs.

23/ CMP deals with operational processes, whereas PID issues are regulatory in nature and are dealt with in different forums, such as the TAG meetings during the OSS test and long term PID administration meetings.

Commission has indicated that it will consider adding new metrics, if necessary, in the future." *New York Section 271 Order* ¶439. The Commission should do the same here.

In any event, Qwest is committed to the long term PID administration process, which is beginning to take shape, *see* Williams Reply Decl. ¶ 84, and is prepared to address any proposed new metrics through that process. Moreover, Qwest has continued to develop and propose new metrics on its own. In June, Qwest began reporting results under diagnostic metric PO-20, which relates to new service order accuracy. In July, as noted above, Quest began reporting additional order accuracy results based on the number of non-trouble ticket calls to service centers. Qwest also has proposed a new billing metric, BI-5, which will measure the promptness with which Qwest acknowledges and resolves CLEC billing adjustment claims processed in the Service Delivery Center. These new metrics demonstrate Qwest's continuing commitment to refine the PIDs to more accurately and meaningfully measure Qwest's performance.

IV. QWEST PROVIDES NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS

A. The State Authorities Uniformly Agree that Qwest's OSS Satisfies Section 271

The State Authorities are unanimous in their praise of the ROC OSS Test and in their agreement that Qwest's OSS satisfy the requirements of Section 271. For example, the MPSC states that "the ROC OSS test comprehensively evaluated Qwest's OSS and, together with Qwest's actual commercial performance results, demonstrated to the [MPSC]'s satisfaction that: (1) Qwest has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and Qwest adequately assists competing carriers to understand how to implement and use all of the OSS functions available to them; and (2) the

OSS functions that the BOC has deployed are operationally ready." MPSC Evaluation at 20-21. The WPSC and WUTC agree, with the Wyoming Commission stating that "[t]he ROC OSS testing provided a comprehensive review of Qwest's capabilities . . . ," and the WUTC concluding "that Qwest performed satisfactorily in the third-party OSS test . . . ." WPSC Comments at 6; WUTC Comments at 3.

The State Authorities reached these conclusions after fully considering all the relevant evidence, including Qwest's commercial performance, Qwest's performance in the ROC OSS Test, and the few evaluation criteria in that Test that were not satisfied. For example, the WUTC "reviewed in detail the results of each test criteria for which KPMG determined that Qwest did not satisfy the criteria, or was unable to determine whether Qwest had satisfied the criteria, and found that none of the test results provide a sufficient basis to find Qwest out of compliance with the requirements of Checklist Item No. 2." WUTC Comments at 14. This view is bolstered by the MPSC, which noted further that "Qwest's commercial performance data, taken as a whole, support Qwest's claim that the company provides CLECs with access to its OSS in a manner that meets Section 271 requirements" and that "Qwest's recent Montana performance data demonstrate that the company consistently complies with the vast majority of the OSS-related PIDs." MPSC Evaluation at 22.

The Justice Department's conditional support of Qwest's Application comports with these findings. Specifically, the Department acknowledges that "repeated iterations of documentation, systems and processes, and substantial re-testing . . . improved Qwest's OSS to the point where only a few questions . . . remain." DOJ Evaluation at 4. To the extent the Department expresses concerns about Qwest's OSS (primarily in connection with manual order processing and electronically auditable billing for UNE-P), the Department nevertheless notes that "evidence submitted by Qwest . . . may support the FCC's approval" of the Application. *Id.* at 2.

B. Recent Commercial Performance Results Confirm that Qwest Provides CLECs with Non-Discriminatory Access to its OSS

Qwest's commercial performance in June and July confirms that it continues to provide CLECs with non-discriminatory access to its OSS. Qwest satisfied the overwhelming majority of OSS-related PIDs in June and July. *See* OSS Reply Decl. ¶ 5. More specifically, Qwest satisfied every pre-ordering PID and the vast majority of ordering and billing PIDs in those months. *Id.* The few instances in which Qwest did not meet a PID standard or benchmark do not affect a finding of overall compliance. *See id.* ¶¶ 6-32.

C. The Commenters Attempt to Distort Qwest's Strong OSS Record

If a consistent theme has emerged in the OSS-related comments filed in this proceeding, it is that, for the most part, CLECs have failed to raise issues that were not already brought to the FCC's attention – and successfully rebutted by Qwest – in the Docket No. 02-148 proceeding. As they did in that proceeding, CLEC commenters distort the record by exaggerating the significance of a few ROC OSS Test evaluation criteria that Qwest did not satisfy, by ignoring Qwest's overall strong performance during the OSS Test, and by discounting Qwest's strong results under the OSS-related performance measures.

1. Pre-Ordering

Qwest provides CLECs with access to pre-order functions in substantially the same time and manner as Qwest, or, for functions that lack a retail analogue, in a manner that affords CLECs a meaningful opportunity to compete. *See* OSS Decl. ¶ 56. For the most part, as in Docket No. 02-148, CLECs raise only one issue in connection with Qwest's pre-ordering capabilities: loop qualification. (The only other issue raised pertains to address validation, and

AT&T's claims in that regard are precisely the same as those it made in Docket No. 02-148.) As explained below, however, the CLECs' claims are not supported by the facts and, in any case, do not detract from a finding of Section 271 compliance. Indeed, CLEC claims regarding Qwest's loop qualification tools are not new; all were raised in the state Section 271 proceedings, and all were rejected by the State Authorities.

Qwest provides CLECs with detailed loop make up information from its back office systems and databases, including LFACS. OSS Reply Decl. ¶ 33. Contrary to the CLECs' suggestions, Qwest does not restrict CLECs to the information available only to Qwest's Retail representatives. Rather, Qwest provides CLECs with underlying loop make-up information that permits CLECs to determine whether the loop will support the CLEC's DSL service. *See* OSS Reply Decl. ¶ 34. Indeed, Covad stated in another proceeding that the Raw Loop Data Tool provides all categories of information Covad requires in order to determine whether it can provide DSL service. 24/ *See* OSS Reply Decl. ¶ 41 n.50; Reply Exhibit LN-1.

AT&T claims that Qwest deprives CLECs of necessary back office information relating to spare loop facilities to determine if CLECs can serve areas with integrated digital loop carrier (IDLC). 25/ Qwest's loop qualification tools and web-based Wire Center Raw Loop Data tool provide detailed information regarding the presence of pair gain devices. OSS Reply Decl. ¶ 79. Furthermore, since an August 2001 enhancement, Qwest's Raw Loop Data Tool has provided information on spare facilities, including those that are not connected to the switch,

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24/ Covad's claim that KPMG's test did not examine Qwest's back office systems and databases is rendered moot by Covad's admission that the Raw Loop Data Tool currently provides all categories of information Covad needs to qualify loops for its DSL service.

25/ AT&T also claims that Qwest's tools do not return information on "loop conditioning." AT&T Comments, Finnegan/Connelly/Menezes Declaration ¶ 144. This claim is curious because the Raw Loop Data Tool and Loop Qualification Tool together return detailed information on the presence, type and location of bridged taps and load coils.

even though the Commission has stated that such information is not a condition of Section 271 relief. 26/ *Kansas/Oklahoma 271 Order* ¶ 128. Regardless, Qwest will agree to incorporate an audit provision, based on language approved by the WUTC, to assure CLECs that Qwest provides all requisite loop qualification information. *See* OSS Reply Decl. ¶ 83 n.96.

Covad's sole remaining complaint regarding Qwest's tools is that the Raw Loop Data Tool at times returns inaccurate information. *See* Covad Comments at 63-77. Covad's allegations, however, are based on data that are more than a year old and do not reflect the numerous enhancements to the loop qualification tools described in the OSS Reply Declaration. Among other improvements, Qwest now provides loop make-up information for non-listed and non-published numbers, has incorporated a "recent changes" feature that returns the most current LFACS information in response to a query, and has significantly revamped the Loop Qualification Tool to return loop make-up information in a user-friendly format based on LSOG 5 guidelines. Covad ignores these and other enhancements that address many of Covad's stated concerns. Covad also ignores Qwest's manual process, *see* OSS Decl. ¶ 85, whereby CLECs can request that Qwest investigate incomplete, unclear, or potentially inaccurate results.

This Commission previously has addressed allegations similar to Covad's and has found that alleged inaccuracies in a BOC's loop qualification information are not evidence of discrimination where the BOC relies upon the same data source as CLECs. *See Kansas/Oklahoma 271 Order* ¶ 126; *Massachusetts 271Order* ¶ 66. As KPMG confirmed, the data source underlying the Retail and Wholesale loop qualification tools is the same. *See Final*

26/ The material AT&T cites to support its claim that Qwest does not provide spare facility information pre-dates this enhancement. *See* AT&T Comments, Finnegan/Connelly/Menezes Declaration ¶ 144.

Report at 124. 27/ Thus, Qwest meets Commission requirements for providing access to loop make-up information.

AT&T and Covad claim that Qwest must create the functionality for CLECs to perform mechanized loop tests ("MLTs") as a pre-order functionality. The Commission's previous Section 271 decisions do not mandate the performance of MLTs on a pre-order basis as a condition of compliance with the *UNE Remand Order*, and none of the State Authorities has required Qwest to create this functionality. Contrary to the CLECs' allegations, a pre-order MLT will provide neither more complete nor more accurate loop make-up information. *See* OSS Reply Decl ¶ 45.

2. Ordering

As explained in Section IV of Qwest's initial OSS Declaration, Qwest provides CLECs with nondiscriminatory access to the OSS functions necessary for placing wholesale orders. *See* OSS Decl. ¶¶ 155-360. This is because Qwest provides CLECs with accurate and timely order confirmation, rejection, completion and jeopardy notices, and flows-through Wholesale orders at parity with retail. *See id.* The CLECs in their comments attempt to discredit Qwest's abilities by mischaracterizing the company's performance and exaggerating deficiencies. Once again, these comments are similar to – if not exactly the same as – the claims these CLECs made in Docket No. 02-148. As explained more fully below, none of these claims withstands scrutiny.

27/ Covad suggests that Qwest's Retail DSL tool has the functionality to "update" loop make up information. It does not.

a) Qwest's Manual Processing Errors are Within an Acceptable Range and Do Not Affect CLECs' Ability to Compete in the Local Market

AT&T, Covad and WorldCom claim that Qwest commits excessive errors while manually processing CLEC orders. *See* AT&T Comments at 42-44 and Finnegan/Connolly/Menezes Decl. ¶ 178-200; Covad Comments at 47-52; WorldCom Comments at 16 and Lichtenberg Decl. ¶¶ 67-69. These are the same claims made by these CLECs in Docket No. 02-148. The only non-anecdotal evidence these CLECs offer to support their claim is a single Observation (O3110) that was closed/unresolved in the Third Party Test based on a mere eight manual processing errors. *See id.*

During the Third Party Test, Qwest satisfied all but one of the test criteria evaluating its ability to handle and process orders manually. *See* Final Report at 145-151. KPMG was "unable to determine" whether Qwest satisfied evaluation criterion 12-11-4 (based on Observation 3110, noted above), but the issue raised by this criterion was limited, and, given Qwest's otherwise excellent performance during the test, easily explainable. *See id.* at 145-146.

The details of why KPMG was "unable to determine" this criterion – as well as two related criteria – were described in Qwest's initial OSS Declaration and are elaborated on in its OSS Reply Declaration. See OSS Reply Decl. ¶¶ 94-96; OSS Decl. ¶¶ 328-331. Generally, concerns arose in connection with Qwest's manual processing of orders. *See id.* But these concerns were based on a mere eight LSRs that Qwest did not manually process correctly during the test. *See id.* The relatively small degree of error committed by Qwest on manually processed orders suggests that CLECs suffer no material competitive harm from them. *See* OSS Reply Decl. ¶¶ 97-98. Surely, these numbers provide no basis for the CLECs' sweeping generalizations.

None of the State Authorities has identified manual service order accuracy as an issue, and no state in Qwest's region that has fully considered a Qwest Section 271 application has found that Qwest's manual service order accuracy precludes CLECs from a meaningful opportunity to compete the marketplace for local service.

Qwest has taken – and continues to take – quality assurance measures directed at reducing the number of human errors in processing. *See* OSS Reply Decl. ¶¶ 110-119. In addition, Qwest has filed and begun to report results under a new PID (PO-20) to monitor Qwest's manual processing of orders. *See id.* ¶¶ 115-119. Qwest's June and July results show that the company is consistently processing over 90% of Resale/UNE-P POTS LSRs and over 95% of Unbundled Loop LSRs accurately under this measure. *See id.* ¶ 32. Qwest also has submitted PO-20 to the application states and has asked them to include this measure in its QPAPs. *See* OSS Reply Decl. at ¶ 117, Reply Exhibit CLD-15 (Qwest August 20 Ex Parte Confirming Submission of PID PO-20 to States for Inclusion in PAP).

AT&T, Covad and WorldCom claim that they are not satisfied with PO-20, but none provides an alternative. *See* OSS Reply Decl. ¶ 17. That these CLECs had ample opportunity to seek a manual service order accuracy measure in the past but did not strongly suggests that their complaints about Qwest's proposed PID at this late date are disingenuous. Nevertheless, Qwest has submitted PO-20 to the Long-Term PID Administration forum for CLEC input and further refinement.

Commercial data demonstrate that CLECs are not suffering any material adverse impact from manual processing errors, and CLEC commenters present no evidence that they have been harmed by the level of human error in Qwest's region. Instead, they only speculate that they *could* be harmed by human error. In hearings before the State Authorities, AT&T

claimed that human error had three potential impacts on CLECs: (1) longer than expected due dates, (2) erroneous rejects, and (3) improperly installed services. *See* Docket No. 02-148 Application Attachment 5, Appendix P, Colorado OSS hearing, June 10, 2002 at 156, lines 11-24. AT&T, Covad, Eschelon and WorldCom include some of the same claims in their comments in this proceeding. The evidence in the record, however, demonstrates that CLECs are not experiencing any of these potential impacts in Qwest's region.

First, with regard to longer-than-expected due dates, Liberty reviewed more than 2000 unbundled loop orders, and while Liberty did find that Qwest made human errors while populating application dates on service orders, those errors were found on fewer than 0.5% of the LSRs reviewed; significantly, *not a single error resulted in the CLEC receiving a longer-than-expected due date*. *See* Williams Reply Decl. ¶¶ 37-40. Furthermore, KPMG specifically reviewed whether Qwest properly assigned due dates requested by the Pseudo-CLEC, and found that Qwest had satisfied that test criterion. *See Final Report* at 82 (Evaluation Criterion 12-5-8). Finally, these test results are confirmed by Qwest's recent performance under PO-20, which, as noted above, demonstrates that Qwest manually processes service orders accurately over 90%, and, in the case of Unbundled Loops, over 95%, of the time. *See* OSS Reply Decl. ¶ 32.

With regard to AT&T's second claim, erroneous rejects, Qwest's data demonstrate that it erroneously rejects less than one percent of manually processed orders. *See* OSS Reply Decl. ¶ 106.

With regard to AT&T's third claim, improperly-installed services, both the OSS test and Qwest's PID results demonstrate that CLECs are not experiencing a problem in Qwest's region. KPMG found that Qwest had satisfied the test criteria relating to (1) whether the features and other elements requested on LSRs were correctly populated on the resulting CSRs and

(2) whether the features requested on LSRs were properly installed in the switch. *See* Final Report at 182-187 (Evaluation Criteria 14-7-12, 12-1-2, 12-1-3 and 12-1-4). Furthermore, Qwest's OP-5 results demonstrate that Qwest consistently installs service for CLECs with as-high or higher quality than the services it installs for its end-users. *See* OSS Reply Decl. ¶ 108.

In the few instances in which manual processing errors do occur, CLECs have several (and soon will have more) resources to which they can turn to resolve issues that may arise. *See* OSS Reply Decl. ¶¶ 110-113. For example, CLECs can track their orders through IMA tools provided by Qwest; contact the Qwest Help Desk; work with the Service Management Team assigned to them; and, through the Change Management Process, request system, product or process changes to improve their interaction with Qwest. *See id.* In short, to the extent manual processing errors have been committed by Qwest, they have not been at a level that affects CLECs in a materially competitive way.

b) Qwest Rejects LSRs Only When Appropriate

AT&T claims that Qwest rejects a very high rate of electronically-submitted CLEC orders. *See* AT&T Comments at 41-41 and Finnegan/Connolly/ Menezes Decl. ¶164. AT&T made the same claim in Docket No. 02-148. AT&T can support its assertion only by identifying aberrational or aggregate PO-4 results that do not take into account the fact that rejections are often the product of CLEC error. *See* OSS Reply Decl. ¶ 120. It provides no other evidence.

PO-4 is a diagnostic PID designed to help Qwest and CLECs identify potential problems with electronic and manual CLEC LSR submissions. *See id.* ¶ 123. Because PO-4 results are reported for all CLECs combined, aggregate reject rates are sometimes artificially inflated by CLECs that submit high volumes of LSRs incorrectly (resulting in their rejection). *See id.* ¶ 129. On a CLEC-specific basis, Qwest's PO-4 results show that some CLECs that submit significant volumes of LSRs are capable of achieving low reject rates. *See id.* ¶¶ 126-138. This proves that Qwest is capable of achieving low reject rates when CLEC LSRs are submitted correctly.

WorldCom contends that KPMG did not assess Qwest's ability to identify multiple errors in an LSR. *See* WorldCom Comments at 18 and Lichtenberg Decl. ¶ 83. This is precisely the same issue WorldCom raised in Docket No. 02-148. Contrary to WorldCom's assertion, however, the issue of identifying and testing multiple errors was addressed as part of the Vendor Technical Conference held on May 15, 2002. Transcript of ROC OSS 271 Vendor Technical Conference #3 at 153-154 (Question 11). At the conference, WorldCom asked HP: "Did HP's evaluation, which found that accurate and clear error messages were returned on resale orders, include instances where multiple error messages were returned for one LSR, so that HP confirmed that the returned error messages reflected all errors included on the LSR. [sic]" *Id.* HP answered in the affirmative. *Id.* at 154. Although HP did not submit LSRs with multiple orders intentionally, in the course of transaction testing HP encountered multiple unplanned errors in LSRs which allowed it to assess and validate Qwest's response and processes.

c) LSRs Can Successfully Flow-Through Qwest's OSS

AT&T and WorldCom claim (as they did in Docket No. 02-148) that an excessive number of LSRs that are electronically submitted to Qwest fall out for manual processing. AT&T Comments at 42 and Finnegan/Connolly/Menezes Decl. ¶¶ 168-177; WorldCom Comments at 14 and Lichtenberg Decl. ¶¶ 58-62. WorldCom argues in particular that Qwest's flow-through rate for UNE-P orders has been poor. WorldCom Comments at 14-15 and Lichtenberg Decl. ¶¶ 61-62. But Qwest's commercial performance results under PO-2A and PO-2B show that, in February through July, Qwest flowed through a high rate of flow-through-eligible UNE-P orders for all CLECs in the aggregate. *See* OSS Reply Decl. ¶¶ 142; OSS Decl. ¶¶ 293, 298, 303 and 309.

CLEC-specific performance results further support the conclusion that Qwest is capable of achieving high PO-2A and PO-2B flow-through rates for UNE-P. *See* OSS Reply Decl. ¶¶ 143-152. Over the past six months, only one CLEC has submitted UNE-P LSRs in significant volumes in the application states. That CLEC achieved monthly flow-through rates for UNE-P that have reached as high as 92.31% under PO-2A and 100% under PO-2B. *See id.* ¶¶ 144, 148.

A number of CLECs have submitted high volumes of LSRs for products such as Resale over the past six months in the application states. Those CLECs also have been able to achieve monthly flow-through rates that have reached as high as 94.38% under PO-2A and 100% under PO-2B. *See id.* ¶¶ 154-163. When a CLEC's flow-through rate is low, Qwest works with the CLEC to analyze the cause and offer the CLEC additional training. Qwest's CLEC-specific performance results show that low aggregate flow-through rates, to the extent they exist, stem from deficiencies in CLEC systems or processes, not Qwest's, and thus should not affect a finding of Section 271 compliance. Indeed, the FCC has held that "a BOC is not accountable for orders that fail to flow-through due to [CLEC]-caused errors." *Georgia/Louisiana 271 Order* ¶ 145.

Qwest's CLEC-specific flow-through rates under PO-2A are comparable to those of BOCs that have received Section 271 relief. *Compare* Washington Commercial Performance Results at 52-55 (flow-through rates in July under PO-2A-2 of 52.94% to 76.40% for resale, unbundled loops, LNP and UNE-P) *with New York 271 Order* at n.512 and 569 (flow-through rates for resale of 45% to 54% and for UNEs of 59% to 63%); *Massachusetts 271 Order* ¶ 49 (total flow-through rates of 54% to 67%); *Rhode Island 271 Order* at Appendix B (flow-through rates for resale of 42% to 56% and for UNEs of 60% to 79%); *Maine 271 Order* at Appendix B (flow-through rates for resale of 40% to 64%); *Vermont 271 Order* at Appendix B (flow-through rates for resale of 43% to 51% and for UNEs of 45% to 58%); *New Jersey 271 Order* at Appendix B (flow-through rates for resale of 79% to 82% and for UNEs of 35% to 54%).

d) Qwest's FOCs are Reliable

Covad claims that Qwest discriminates by sending it "fake FOCs." *See* Covad Comments at 38-42. This is precisely the same argument – made virtually verbatim – that Covad made in Docket No. 02-148. AT&T makes a similar argument. AT&T Comments at 41 and Finnegan/Connolly/Menezes Decl. ¶¶ 156-158. AT&T and Covad base their claims on Qwest's CLEC-specific results for PID PO-15 (Number of Due Date Changes). *See id.*; Covad Comments at 38. But a significant percentage of due date changes are improvements in the due date, which helps CLECs. *See* OSS Reply Decl. ¶ 177. In May, for example, under PO-15, nearly 30% of all due date changes in connection with service orders completed prior to (or on) the original due date related to changes to earlier, CLEC-approved due dates. *See* OSS Reply Decl. ¶ 179 n.226.

Covad contends that Qwest transmits multiple FOCs to CLECs because Qwest "is not doing the preliminary work necessary" prior to sending the FOC. Covad Comments at 38-42. This is not true. Qwest uses a FOC to communicate that it has received the CLEC request, issued an internal service order, and assigned a due date to the request. *See* OSS Reply Decl. ¶ 174. In certain instances, Covad has elected to receive multiple FOCs (rather than jeopardy notices, as do other CLECs). *See id.* ¶ 175. In other instances, Qwest issues multiple FOCs to reflect the varying status of an order. *See id.* ¶ 176. But in all cases, the issuance of multiple FOCs is based on agreed-upon business rules. *See id.* Furthermore, Qwest's provisioning measures, such as Installation Commitments Met (OP-3), are measured from the due date contained on the first FOC sent by Qwest. Qwest is performing consistently at a very high level under OP-3. *See* Williams Reply Decl. at ¶ 56. The commercial data demonstrate that Qwest is consistently meeting the due date on the first FOC sent, and that CLECs can rely on the due dates set forth on Qwest's FOCs. There is no Section 271 deficiency here.

e) Qwest Provides Timely Jeopardy Notices to CLECs

WorldCom claims that Qwest issues jeopardy notices inappropriately after issuing a FOC. *See* WorldCom Comments at 17-18 and Lichtenberg Decl. ¶¶ 72-73. This is precisely the same claim made by WorldCom – and responded to by Qwest – in Docket No. 02-148, and WorldCom has not identified any new facts to merit a different response here. The limited circumstances in which Qwest sends a jeopardy notice after a FOC were discussed with, and agreed to by, CLECs. *See* OSS Reply Decl. ¶¶ 182-183. Most of the scenarios in which jeopardy notices are sent after FOCs are within the CLECs' control. *See id.* ¶ 184. This issue is not Section 271-affecting.

Recent and historical commercial performance shows that, contrary to WorldCom's claims, Qwest provides timely jeopardy notices to CLECs. *See id.* ¶ 186. Moreover, Qwest's performance for Installation Commitments Met (OP-3) demonstrates that few jeopardy notices must be sent relative to total orders. The ROC OSS Test supports this evidence, and the few "not satisfied" evaluation criteria do not affect this conclusion. *See* OSS Decl. ¶ 190.

f) CLECs Can Successfully Integrate Pre-Order/Order Information Using Qwest's OSS

In its initial OSS Declaration and subsequent *ex parte* submissions, Qwest provided the FCC with evidence that it meets the standards governing pre-order/order integration under the *New York 271 Order* and the *Texas 271 Order*. *See generally* OSS Reply Decl. at Section III(G). Qwest reiterates that discussion here to show that CLEC criticisms of Qwest's pre-order/order integration functionality are unfounded. 28/

(1) CLECs and Service Providers Have Successfully Developed Interfaces that Integrate Pre-order/Order Data

Qwest has provided the FCC with "evidence of successful commercial integration" in accordance with Section 271 requirements. *See New York 271 Order* ¶ 138; OSS Decl. ¶¶ 187-193. AT&T argues that this evidence is not sufficient proof that CLECs can successfully integrate pre-ordering and ordering information. *See* AT&T Comments at 39-40 and Finnegan/Connolly/Menezes Decl. ¶ 132. Qwest's evidence includes actual commercial usage through affirmations from two EDI service providers – Telcordia and Nightfire – that provide CLECs the capability to integrate through IMA-EDI interfaces. *See* OSS Decl. ¶ 192, Exhibit LN-OSS-13 (Telcordia Letter), Exhibit LN-OSS-14 (Nightfire Letter). Qwest also has provided confirmation from New Access that it performs pre-order/order integration through its IMA-EDI interface. *See* OSS Decl. ¶ 192, Exhibit LN-OSS-15 (New Access Letter). Finally, Qwest has presented confirmation from HP that it built a fully integratable interface during the ROC OSS Test and that CLECs have the ability to integrate pre-order responses with order transactions. *See* Reply Exhibit LN-38 (HP Pre-Order to Order Integration Report, Version 6.0, July 31, 2002) at 10.

AT&T claims that the affirmations by Telcordia and Nightfire are immaterial because they are not CLECs; rather, they are companies that design EDI interfaces. AT&T

28/ Qwest's OSS Reply Declaration also demonstrates that the CLECs' attempts to ascribe high reject rates to Qwest's pre-order/order integration capabilities are unfounded because CLECs that have developed integrated interfaces have achieved low reject rates. *See* OSS Reply Decl. ¶¶ 221-223.

Comments at 39 and Finnegan/Connolly/ Menezes Decl. ¶ 122. But that is precisely the point. Virtually all CLECs use companies such as Telcordia and Nightfire to assist in EDI development. Because CLECs use the integration capability developed by companies such as Telcordia and Nightfire, the testimonials of those companies demonstrate that CLECs can, in fact, integrate pre-order and order information using Qwest's OSS. *See* OSS Reply Decl. ¶¶ 194-195.

AT&T argues that the New Access testimonial is meaningless because it does not provide specific information regarding the nature of New Access's performance of integrated activities. *See* AT&T Comments, Finnegan/Connolly/Menezes Decl. ¶ 133. AT&T and WorldCom also claim that New Access performs integrated pre-ordering and ordering functions only minimally and submits a low volume of orders. *See* AT&T Comments, Finnegan/Connolly/Menezes Decl. ¶ 133; WorldCom Comments, Lichtenberg Decl. ¶ 38. But Qwest already has provided specific information relating to New Access's development of integrated capabilities that responds to each of AT&T's and WorldCom's concerns, including evidence that New Access did not submit a low rate of order volumes compared to other CLECs in their first month of implementation. *See* OSS Reply Decl. ¶¶ 197-201; Reply Exhibit LN-35.

Qwest has demonstrated that 31 CLECs have built interfaces to Qwest's EDI interfaces. *See* OSS Reply Decl. ¶ 203. Based on the testimonials provided by New Access, Telcordia and Nightfire, each of these 31 CLECs is *capable* of integrating pre-order/order data in compliance with the standard established in the *New York 271 Order*. *See id.*

(2) Qwest Provides CLECs with Parsed CSR Data That Permit Them to Integrate Pre-order/Order Information into Their Back Office Systems

In the *New York 271 Order*, the FCC based its findings of Bell Atlantic's compliance in part on evidence that AT&T and WorldCom "integrated parsed CSR retrieval and limited address validation functionality into their back office systems." *See New York 271 Order* ¶ 138. Qwest's offering of confirmations from New Access and HP that each has integrated pre-ordering and ordering functions using parsed data provided by Qwest is just as probative. HP is not an actual CLEC. But its achievement of successful parsing is as meaningful as that of an actual CLEC because HP, like CLECs, achieved integration first-hand through constructing its own EDI interface. *See* subsection (4) below. The salient point here is that HP was able to construct an integratable interface through which HP integrated parsed information. *See* OSS Reply Decl. ¶ 206.

Notwithstanding AT&T's assertion that it has experienced difficulties using parsed data provided by Qwest to populate data electronically onto an LSR, the Justice Department has found that the issues presented by AT&T do "not appear to preclude the full and successful integration of pre-order and order functions for all CLECs." *See* DOJ Evaluation at 11. The evidence also shows that, through the EDI Disclosure Documents, Qwest provides all of the information required by CLECs to successfully auto-populate CSR data in an LSR. *See* OSS Reply Decl. ¶ 207.

(3) During the ROC OSS Test, HP Found that CLECs Can Successfully Integrate Pre-ordering Data into Their Ordering LSRs

HP successfully developed and used an EDI interface that integrated pre-order/order data during the ROC OSS Test. See OSS Decl. ¶ 190. AT&T and WorldCom nit-pick HP's report in an attempt to show that integrating using Qwest's systems can be difficult. AT&T Comments at 40 and Finnegan/Connolly/Menezes Decl. ¶¶ 134-135; WorldCom Comments at 8. These attempts do not contradict HP's clearly stated conclusions that experienced CLECs "can build a CSR to LSR parsing interface" and "CLECs can utilize Qwest's EDI PreOrder transactions to automatically populate an order without data manipulation." See OSS Reply Decl. ¶ 214; Reply Exhibit LN-38 (HP Pre-order to Order Integration Report, Version 6.0, July 31, 2002) at 10.

WorldCom complains of inconsistencies between pre-order and order requirements as well as CSR-related issues to which HP refers in the HP Report and implies that these issues cause difficulties with pre-order to order integration. See WorldCom Comments, Lichtenberg Decl. ¶¶ 31-32. But, as WorldCom itself points out, HP concluded that these issues are not critical enough to prevent an established CLEC, with a professional EDI development team, from being successful in its effort to build a Preorder to Order integration system. *See id.*; *see also* Reply Exhibit LN-38 (HP Pre-order to Order Integration Report, Version 6.0, July 31, 2002) at 9; OSS Reply Decl. ¶ 216.

(4) During the ROC OSS Test, HP Developed and Used an EDI Interface that Integrated Pre-order/Order Data

In the *New York 271 Order*, the FCC relied on KPMG's conclusion that Bell Atlantic provided CLECs with pre-order/order integration capability even though KPMG did not actually build an integrated EDI interface. *See New York 271 Order* ¶ 138. In the ROC OSS Test, HP actually built an EDI interface through which it successfully integrated pre-order/order data. HP's findings in the ROC OSS Test therefore are more probative than KPMG's findings in New York and should be accorded greater weight here. *See* OSS Reply Decl. ¶ 220.

g) Commenters' Remaining Criticisms of Qwest's Ordering Processes are Insignificant, Unsubstantiated or Moot

CLECs raise certain other claims regarding Qwest's ordering processes that, for the most part, are the same as claims they raised in Docket No. 02-148, and should be dismissed. WorldCom contends that Qwest discriminates against CLECs by not offering migration by name and telephone number. *See* WorldCom Comments at 4-11, Lichtenberg Decl. ¶¶ 41-47. But neither WorldCom nor any other CLEC requested this capability through the Change

Management Process until the day Qwest filed its Docket No. 02-148 Application. *See* OSS Reply Decl. ¶ 229.

WorldCom also claims that, by not supporting migration of orders without features, Qwest fails to meet the "same time and manner" test for its ordering processes. *See* WorldCom Comments at 4-11 and Lichtenberg Decl. ¶¶ 41-47. But Qwest only recently received a change request through CMP for this and is in now implementing the CR in two phases. *See id.* ¶¶ 227-228.

Eschelon's claim that the IMA-GUI is too cumbersome also is without merit. *See* Eschelon Comments at 18-19. As described in the initial OSS Declaration, Qwest's IMA-GUI interface is easy to use. *See* OSS Decl. ¶¶ 62-65, 169-170. Indeed, HP stated in its Interim Report that "P-CLEC representatives who have used it found the GUI application to be remarkably intuitive and easy to navigate, provided the user possesses certain basic computer skills." Attachment 5, Appendix G, Interim Report of the P-CLEC, Version 2.0, March 31, 2001, at 82. Finally, although 162 CLECs have used the IMA-GUI to access and submit LSRs from June 2001 through May 2002, *see* OSS Decl. ¶ 170, no other CLEC has complained that the IMA-GUI is cumbersome. The ten CLEC-submitted CRs seeking to improve perceived deficiencies in the IMA-GUI (all of which have been prioritized for inclusion in IMA Release 12.0) should address any concerns that Eschelon may have with regard to the IMA-GUI.

CLECs raise three other claims relating to Qwest's ordering processes that are easily dismissible. First, AT&T claims that Qwest takes too long to update Customer Service (CUS) Codes. *See* AT&T Comments at 44-45 and Finnegan/ Connolly/Menezes Decl. ¶¶ 225-230. But the 3-to-5 day interval for updating the vast majority of CUS Codes applies equally to Wholesale and Retail operations. *See* OSS Reply Decl. ¶ 231.

Eschelon's second claim, that CLEC-to-CLEC orders are prevented in Release 10.0 when account numbers ("ANs") are not populated in IMA, also misses the mark. *See* Eschelon Comments at 16-18. On July 10, 2002, Qwest implemented a fix that ensures IMA 10.0 can accept electronically submitted CLEC-to-CLEC orders with blank or placeholder ANs. *See* OSS Reply Decl. ¶ 238. Eschelon's third claim, that Qwest requires excessive use of the manual handling indicator in placing orders, also is misleading. *See* Eschelon Comments at 7 n13. In October 2001, Qwest advised the CLEC community that a limited number of orders require CLECs to select manual handling. *See* OSS Reply Decl. ¶ 239. Qwest has continued to discuss with CLECs methods that will allow mechanical processing of CLEC-to-CLEC migrations in the future through the Ordering and Billing Forum ("OBF") and CMP. *See id.* None of these issues precludes a finding of compliance with respect to Qwest's ordering processes.

3. Provisioning

CLECs once again raise only a few issues in connection with provisioning, none of which prevents the FCC from finding that Qwest satisfies Section 271. Eschelon's claim regarding Loss and Completion Reports is both minor and moot, as Qwest recently implemented a change to accommodate Eschelon's concern. *See* OSS Reply Decl. ¶ 245. Eschelon's claim regarding "unannounced dispatches" also is a red herring, as Qwest recently implemented a process modification to eliminate unnecessary dispatches, which appears to have eliminated the problem. *See id.* ¶ 247. (Eschelon's desire for a router test to ensure that Qwest's DSL-capable loops are provisioned properly is appropriately addressed in the Stewart Reply Declaration.)

4. Maintenance and Repair

CLECs make several claims relating to Qwest's M&R that can easily be dismissed and should not affect a finding of Section 271 compliance. AT&T contends that

Qwest does not process transactions to modify trouble reports in a timely manner. AT&T Comments at 45 and Finnegan/Connolly/Menezes Decl. ¶ 233. But the ROC OSS Test's evaluation of CEMR shows that Qwest can indeed modify trouble reports in a timely manner. *See* OSS Decl. ¶¶ 441-446. Qwest met all evaluation criteria during the first two phases of the test, all 13 benchmarks for the normal days, and 12 of the 13 benchmarks for the peak day during the Volume Test. *See* OSS Decl. ¶¶ 442-444. Qwest barely missed the thirteenth benchmark for peak days. *See id.*

Since the close of the test, KPMG has noted on several occasions that the three-second delay in processing non-designed edit transactions, which caused Qwest to miss the thirteenth benchmark, "wasn't substantial." *See, e.g.,* Nebraska Transcript of Proceedings, May 29, 2002, at 37-38. Even AT&T agreed in the course of state proceedings that "Qwest's decision to take this as closed/unresolved instead of attempt[ing] to get that three seconds removed from the time probably was a reasonable approach." *See* Nebraska Transcript of Proceedings, May 6, 2002, at 68.

The second claim raised by CLECs – that Qwest's rate of successful repairs is inadequate – also can be dismissed. AT&T Comments at 45 and Finnegan/Connolly/Menezes Decl. ¶¶ 232, 238-239; WorldCom at 19-20 and Lichtenberg Decl. ¶¶ 86-88. The commenting CLECs base this claim solely on the result of the ROC OSS Test. But KPMG has testified that Qwest's repair processes are parity-by-design, and that the evaluation criterion relating to this issue in no way suggests that Qwest discriminates in connection with repair functions. *See, e.g.,* Qwest's Docket No. 02-148 Application, Attachment 5, Appendix P, Colorado OSS Hearing, June 10, 2002, at 127-29. Because Qwest provides access to M&R functionality on a nondiscriminatory basis, this is not a Section 271 issue. Qwest addressed this issue – and related closed/unresolved Exception 3058 – in its Application. *See* OSS Decl. ¶¶ 458-461. As stated there, Qwest adequately repaired over 92% of POTS Resale, UNE-P, and UNE-L circuits on the first attempt. *See id.* ¶ 458. In addition, Qwest's analysis concluded that Qwest accurately repaired the inserted trouble at least 97.7% -- not 92% -- of the time. *See* OSS Reply Decl. ¶ 249.

CLECs allege that Qwest does not maintain accurate repair records for them. *See* AT&T Comments at 45 and Finnegan/Connolly/Menezes Decl. ¶¶ 234-237; Eschelon Comments at 28. This claim too was addressed in Qwest's Application and is without merit. *See* OSS Decl. ¶¶ 453-457. KPMG testified that this issue in no way affects the fact that Qwest provides nondiscriminatory access to M&R functionality. *See* Qwest's Docket No. 02-148 Application, Attachment 5, Appendix P, Colorado OSS Hearing, June 10, 2002, at 127-29. Thus, it does not implicate Section 271 concerns. Qwest already has explained why its performance was satisfactory and has described recent improvements implemented through training and ongoing field coding process audits. *See id.* and Exhibit LN-OSS-36. Updated audit results show continued improvements. *See* OSS Reply Decl. ¶ 253, Reply Exhibit LN-46.

Eschelon was the only CLEC to raise additional concerns relating to M&R. But Eschelon's issues are unique to it and do not implicate broader Section 271 concerns. *See* *Georgia/Louisiana 271 Order* ¶ 172 n.644; *Kansas/Oklahoma 271 Order* ¶ 207. Moreover, each of the issues raised by Eschelon is easily explainable and need not deter the Commission from a finding of compliance. *See* OSS Reply Decl. ¶¶ 254-269.

5. Billing

The evidence demonstrates that Qwest provides complete, accurate and timely Wholesale bills and usage records to CLECs. *See, e.g.,* OSS Decl. ¶¶ 519-551. The results of the ROC OSS Test, Qwest's commercial performance results, and the fact that disputed dollar amounts have amounted to only 1.12% of Qwest's multi-million bill base in the four application states supports this assertion. *See* OSS Reply Decl. ¶¶ 301-303.

a) Qwest's Wholesale Bills are Auditable

AT&T and WorldCom claim that Qwest does not provide Wholesale bills in BOS format and that they are unable to verify the accuracy of their bills. *See* AT&T Comments at 46, Finnegan/Connolly/Menezes Decl. ¶¶ 251-259; WorldCom Comments at 20, Lichtenberg Decl. ¶¶ 89-95. But Qwest provides CLECs with Wholesale bills in multiple electronic formats, including BOS. *See* OSS Decl. ¶ 481; OSS Reply Decl. ¶ 274. Moreover, Qwest's Wholesale bills are auditable. *See* OSS Reply Decl. ¶¶ 304- 311.

Eighteen of the 27 CLECs that order UNE-P services from Qwest in the four application states receive their bills in ASCII format. *See id.* ¶ 278. Seven CLECs receive UNE-P bills only on paper, two receive them *via* EDI, and one receives them in BOS format (and began doing so only recently). *See id.* The evidence – as distinguished from the broad invective of AT&T and WorldCom – demonstrates that CLECs that receive their UNE-P bills in ASCII format are capable of auditing their bills. *See id.* ¶¶ 304-311. In fact, ASCII bills can be "easily transferred into a computer spreadsheet or other electronic system that allows for computer auditing." *See Pennsylvania 271 Order* at n.51. Commercially available software for auditing ASCII bills is abundant and easy to use; CLECs have the option of purchasing or licensing bill-auditing software from vendors; and vendors specializing in bill auditing are capable of auditing Qwest's ASCII bills. *See id.* ¶¶ 307-309. Indeed, CLECs have indicated that Qwest's bills provide them with sufficient information to support auditing, and have submitted bill disputes to Qwest as a result. *See id.* ¶ 311.

That AT&T and WorldCom prefer to receive their Wholesale bills in BOS format, as opposed to ASCII (or EDI), is something Qwest can – and is – accommodating, *see* OSS

Reply Decl. ¶¶ 283-286; but these preferences have no bearing on whether Qwest's billing systems meet the requirements of Section 271. Indeed, the FCC has held that compliance with a particular standard "is not a requirement of providing nondiscriminatory access to OSS functions." *See Louisiana 271 Order* ¶ 137.

Nevertheless, Qwest remains committed to assisting CLECs with their bills and provides CLECs with multiple resources in connection with bill review and analysis. *See* OSS Reply Decl. ¶¶ 312-317. Qwest also has been working with CLECs to accommodate requested changes to its billing systems through the Change Management Process. *See id.* ¶ 318. Finally, Qwest's bill dispute policy – which is documented, defined and adhered to – makes the submission and resolution of a bill dispute an easy process for CLECs. *See id.* ¶¶ 314-321. Currently, Qwest doesn't even assess late payment charges. *See id.* ¶¶ 322-323.

b) Qwest's Daily Usage File is Fully Functional

In yet another sweeping, overwrought (and incorrect) generalization, AT&T claims that Qwest's DUF is insufficient because Qwest passed KPMG's DUF test only "on the sixth try." *See* AT&T Comments at 45-46 and Finnegan/ Connolly/Menezes Decl. ¶¶ 243-245. This is the same incorrect argument AT&T made in the Docket No. 02-148 proceeding. *See* OSS Reply Decl. ¶ 327. The very nature of the military-style ROC OSS Test dictated that testing be repeated when certain evaluation criteria were not met. *See id.* ¶ 332. Qwest's willingness to repair and retest aspects of its DUF should be commended, not criticized. The FCC rejected an identical AT&T claim almost one year ago in Pennsylvania when it noted that the repeated need to correct a billing system during a third party test "helps demonstrate . . . [a] commitment to correcting a systemic problem." *See Pennsylvania 271 Order* ¶ 234. AT&T's other attempts to discredit Qwest's DUF with anecdotal evidence fail for similar reasons. *See* OSS Reply Decl. ¶¶ 334-335.

c) Eschelon's Billing-Related Claims Do Not Affect a Finding of Overall Compliance with Section 271

Eschelon raises a number of billing-related claims, but each presents a unique, company-specific issue that does not affect a finding of overall compliance with Section 271. *See id.* ¶¶ 336-343.

D. "Unfiled Agreements" Issues Do Not Impact the Record Here

AT&T claims that unfiled agreements somehow taint the results of the ROC OSS Test. *See* AT&T Comments at 31; AT&T August 16 *ex parte* submission at 10. But, as explained in Section X, below, this argument completely ignores the record evidence in this proceeding and KPMG's testimony in recent state Section 271 proceedings. Qwest will not repeat the extensive evidence already presented to refute AT&T's argument here. For present purposes, it is sufficient to note that neither KPMG nor any of the State Authorities that have filed comments in this proceeding (or in Docket No. 02-148 for that matter) have found that unfiled agreements tainted the results of the ROC OSS Test.

V. QWEST'S CHANGE MANAGEMENT PLAN SATISFIES THE REQUIREMENTS OF SECTION 271 AND COMMISSION PRECEDENT

The FCC has established seven Section 271 criteria under the heading of "change management." *New Jersey 271 Order*, App. C ¶ 42; *see* OSS Decl. ¶ 587. Commenters challenge Qwest's compliance with respect to only three criteria: (1) organization and accessibility of information regarding change management; (2) Qwest's pattern of compliance over time with its plan, and (3) the adequacy of Qwest's EDI interface testing environment. Commenters have effectively conceded Qwest's compliance with the other four. 29/

29/ These are (1) substantial input from competing carriers in the design and continued operation of the change management plan; (2) adequacy of the change management dispute

Every State Authority concluded that Qwest's change management process, including its stand alone test environment (SATE), satisfies Section 271. 30/ The WUTC, for example, concluded that the participants in the collaborative change management redesign process "have developed a thorough and detailed CMP that we believe will create a more structured, and hopefully less contentious, business environment for Qwest and the CLECs. As demonstrated below, none of the other commenters advances any persuasive reason to question the adequacy of Qwest's change management process, including its interface testing environments.

A. Qwest's Change Management Plan Is Complete

AT&T, alone among the commenters, claims that Qwest's change management plan is not yet complete for purposes of Section 271 review, pointing to the fact that two issues remained to be resolved by the redesign team and/or implemented after the Application was filed: (1) product and process production support manual workaround procedures and (2) voting logistics. AT&T Comments at 33 and Finnegan/Connolly/Menezes Decl. ¶¶ 36-38.

By any measure, by the time it filed its Application, Qwest had in place and fully implemented a Section 271-compliant change management plan. The fact that details on the logistics of voting remained to be resolved, and that one aspect of product and process change procedures remained to be implemented at the time Qwest filed its Application does not change this fact. As the Department of Justice stated in its July 23, 2002, Evaluation of Qwest's first

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resolution procedures; (3) adequacy of EDI documentation; and (4) quality of technical assistance provided to CLECs. *See New Jersey 271 Order*, App. C ¶ 42.

30/ *See* MPSC Evaluation at 23; PSCU Consultative Report at 4; WUTC Comments at 14-15; WPSC Comments at ¶11.

multi-state Application ("Docket No. 02-148 DOJ Evaluation"), which concluded (at 26) that Qwest's CMP complied with Section 271:

> Although certain aspects of the redesign, particularly those governing product and process changes, were only recently agreed upon by Qwest and the participating CLECs, key provisions of the CMP have been in place for more than six months . . . .

In any event, the two issues remaining after the Application was filed are not essential to a Section 271-compliant change management process, and have by now been resolved through the redesign process and fully implemented. The manual workaround procedures had already been agreed to and incorporated into the CMP Framework at the time the Application was filed and were fully implemented on July 15. See CMP Framework, § 12.8; Reply Declaration of Dana L. Filip on Change Management ("CMP Reply Declaration") ¶ 5. The manual workaround procedures are only a small part of the CMP product and process procedures, which were otherwise complete and fully implemented by April 22, 2002. *Id.*

The voting procedures issue was so unimportant that AT&T did not even include it in its list of the issues that it deemed essential for purposes of Section 271. *See* CMP Decl. ¶¶ 139-140 and Exhibits DLF-CMP-11, DLF-CMP-12. The CMP voting procedures are well-established, and only the logistics of voting remained to be agreed upon by Qwest and CLECs after the June 6 redesign meeting. CMP Reply Decl. ¶ 7. These remaining details were agreed upon at the July 10 redesign conference call and implemented on July 17. *Id.*; CMP Framework § 17.0.

B. Qwest has Demonstrated a Pattern of Compliance Over Time With its Change Management Procedures

Qwest has demonstrated a strong pattern of compliance over time with the redesigned CMP plan, whose key Section 271 provisions had been in place for six months or more at the time of filing of the Application. CMP Decl. Section V(D). Several commenters nevertheless take issue with Qwest's showing. Their primary claim is that Qwest's redesigned CMP has not been in place long enough for Qwest to have demonstrated compliance over a sufficient length of time. As shown in the CMP Declaration, Qwest has amassed a record of very high levels of compliance with its plan over time, a record which continues to this day. 31/

AT&T makes much of the fact that several redesigned CMP provisions were implemented on April 1, 2002, or later, giving Qwest at most two months in which to demonstrate a pattern of compliance. AT&T Comments, Finnegan/Connolly/Menezes Decl. ¶39. Two months (in the case of product and process changes) is adequate time to demonstrate a pattern of compliance, however, particularly when the balance of the redesigned procedures have been in place for at least six months and Qwest has demonstrated a strong and consistent pattern of compliance for those. In hearings before State Authorities, AT&T has admitted as much. In a hearing on change management before the WUTC, Mr. Menezes of AT&T testified as follows:

> Another component is that Qwest has adhered to the process over time. . . . And Ms. Doberneck has mentioned two to three months. And I think that's what we would be looking for, some period of time once it's done, and evidence to support that there is this adherence.

Washington Change Management Hearing, April 26, 2002, (Reply Exhibit LN-69), p. 07516. As Mr. Menezes mentioned, Ms. Doberneck of Covad agreed: "I think systems is a little bit different, but if we are talking product and process, two or three months should be a sufficient basis." *Id.* at 07471.

31/ Although Qwest relies in this Application on its record in complying with its CMP as of the date of filing, *see* Exh. DLF-CMP-5, updated compliance data, through July 31, 2002, confirm Qwest's continued strong pattern of compliance with the plan, including the more recently implemented aspects of the plan. *See* CMP Reply Decl. ¶ 20 and Reply Exhibit DLF-3 (Change Management Improvements Matrix).

The Department of Justice agreed that the Qwest CMP satisfies Section 271, even though certain provisions were adopted recently, observing that "CMP redesign and implementation is a dynamic process." Docket No. 02-148 DOJ Evaluation at 26. Moreover, the Department's evaluation of the instant Application states that "[n]othing in the record of Qwest's second multistate Application leads the Department to revise its conclusions that Qwest's redesigned CMP is sufficient to determine and implement necessary changes to its OSS and that its record of compliance is adequate." DOJ Evaluation at 18 n.89. And, although Qwest need not rely on this fact, Qwest's strong pattern of compliance with product and process procedures has continued through the end of July. CMP Reply Decl. ¶ 20 (citing compliance of between 98% and 100%).

Product and process changes are not an essential part of a Section 271-compliant change management plan. *See* CMP Reply Decl. ¶ 27. *See, e.g., Georgia/Louisiana 271* Order ¶ 180 n.673 (the FCC's "prior orders recognize that changes that do not impact OSS interfaces are not necessarily required to be a part of a change management process," citing *Pennsylvania 271 Order*, 16 FCC Rcd at 17451 ¶ 51.) As the Justice Department observed, however, it is not necessary to decide this issue in order to conclude that Qwest's CMP was adequate at the time of filing under Section 271. *See* Docket No. 02-148 DOJ Evaluation at 26 n.125.

AT&T and WorldCom rely heavily on the KPMG closed undetermined findings on change management. *See* AT&T Comments at 34-35; WorldCom Comments, Lichtenberg Decl. ¶¶ 97-98. Qwest fully addressed KPMG's findings in the CMP Declaration, and need not repeat them here. *See* CMP Decl. ¶¶ 101-118. KPMG did not have an opportunity to observe the new product and process procedures, due to the timing of the close of the test, but the Commission can itself conclude, based on the ample evidence of compliance since that time, that

Qwest has demonstrated a pattern of compliance. KPMG's inability to observe CLECs and Qwest prioritizing regulatory changes was due to the fact that these changes were not subject to prioritization until the CPUC ruled in the CLECs' favor on the impasse issue. KPMG did not need to observe prioritization of regulatory changes in order to be confident that the prioritization process works well, because the impasse issue (prioritization of PIC/PAP changes) was unrelated to the basic functioning of the prioritization process. 32/ *See* CMP Reply Decl. ¶ 28. The CLECs also are unsuccessful in casting doubt on the positive conclusions reached in Arizona regarding the adequacy of Qwest's CMP plan and pattern of compliance with that plan. *See* CMP Reply Decl. ¶ 29.

None of the incidents of alleged noncompliance with Qwest's CMP call into question the adequacy of Qwest's CMP under Section 271 or its pattern of compliance. For the most part, the incidents mentioned are the same handful that the CLECs have discussed in each of the state Section 271 proceedings throughout Qwest's region. In none of the cases cited is there a violation of Qwest's change management procedures. *See* CMP Reply Decl. ¶¶ 30-39; CMP Decl. ¶¶ 154-55. Unsupported, anecdotal evidence does not carry great weight in evaluating a BOC's compliance with Section 271 requirements. *See, e.g., Kansas/Oklahoma 271 Order* ¶ 207; *Georgia/Louisiana 271 Order* ¶ 267. Rather, what is relevant is whether there is a pattern of such violations or of a systemic problem, *Kansas/Oklahoma 271 Order* ¶ 281, something that is entirely absent from the record in this proceeding.

32/ As noted in the CMP Declaration, to our knowledge most if not all of the other BOCs refuse to allow CLECs to prioritize regulatory changes at all. CMP Decl. ¶ 112.

C. Qwest Provides CLECs a Stable Test Environment that Mirrors Production

At the time Qwest filed its application, 31 CLECs had successfully used Qwest's two testing environments, Interoperability and SATE, to develop EDI interfaces. For SATE alone, 16 CLECs had used the test environment to successfully go into production. *See* OSS Decl. ¶ 728. Despite this extensive history of commercial usage, the commenting CLECs do not raise a single example of Qwest's testing environments causing actual difficulties in the real world. For their comments, they rely primarily on OSS test results. Nothing in the comments undermines Qwest's showing in its Application that both its Interoperability test environment and SATE satisfy the Commission's Section 271 criteria – namely that they each provide a "stable test environment that mirrors production." *New Jersey 271 Order*, App. C ¶ 42.

Among the commenters, only AT&T questions whether SATE is "stable." AT&T argues that when Qwest makes changes to the test environment to correct "bug fixes," it does not make parallel changes to the production environment. AT&T Comments at 36-37 and Finnegan/Connolly/Menezes Decl. ¶ 89. In fact, Qwest has undertaken to make no changes (other than bug fixes) during the 30-day period prior to implementation of a major release, and it makes those same bug fixes to the production environment. OSS Decl. ¶ 716; OSS Reply Decl. ¶¶ 349-352. This requirement has been incorporated into Qwest's change management procedures. *See* OSS Reply Decl. ¶ 351; Change Management Decl., Exhibit DLF-CMP-2 (CMP Framework), § 8.1.7, 8.1.8.

AT&T and WorldCom also argue that SATE does not "mirror production" within the meaning of Section 271 because SATE does not deliver exactly the same response as would the production environment in every instance. AT&T Comments at 36 and Finnegan/Connolly/Menezes Decl. ¶¶ 100, 104; WorldCom Comments at 23-24 and Lichtenberg Decl. ¶ 111. But the Commission does not require a BOC's EDI test environment to generate, in every instance, the identical response that would be generated in the production environment. Rather, the Commission requires that the test environment "perform the same key functions" as production. *Texas 271 Order* ¶ 138. *See also Georgia/Louisiana 271 Order* ¶ 189. As explained below and in greater detail in the OSS Reply Declaration, § VII(C), SATE clearly satisfies this test.

The purpose of interface testing is to ensure that the CLEC's EDI interface (its code) works properly with the Qwest systems and that CLEC systems will be able to receive and display error messages and other responses, such as FOCs. OSS Decl. ¶ 703; OSS Reply Decl. ¶ 354. It is not necessary for each test response to be identical to the response that would be received in production in order to accomplish these goals.

AT&T and WorldCom nevertheless focus on the fact that, in some instances, a particular test transaction in SATE may return a different response than would be returned in production. As stated in the OSS Reply Declaration:

> What matters in interface testing is that the response comes back in a consistent format every time, and that the correct fields are populated. The content of the data received is not as important because the CLEC's EDI code will generally not act on the content of the data; that will be done by a human being. 33/ A CLEC's EDI interface works with the structure, not the content, of the data received. Each response transaction type has the same structure through which data is returned.

OSS Reply Decl. ¶ 356. Thus, the content of a response may differ between SATE and production, but a CLEC will still be able to test its ability to receive that production response, because it is testing to make sure its software will receive the response in the appropriate field. *Id.* ¶ 359-360. In SATE, CLECs can perform every transaction that they can perform in

33/ Qwest provides scenarios for the CLEC to test those situations in which Qwest believes varying content of the data may require CLECs to code their systems to take into account the variability of the data.

production, for products available in SATE. There is no piece of code that CLECs are unable to exercise through SATE. It is a positive, not a negative, that the responses in SATE are static and repeatable. If a CLEC receives the predicted response every time it runs a test transaction in SATE, it knows its code will work in production. SATE thus "perform[s] the same key functions" for CLECs as the production environment does, which is all that is required under Section 271. *Texas 271 Order* ¶ 138.

Qwest documents the manner in which SATE responses differ from production responses, and documents which production error messages are not included in SATE. *See* OSS Reply Decl § VII(D); OSS Decl. ¶¶ 723, 752. Qwest also will promptly add new test data or additional error messages to SATE upon CLEC request, a factor viewed as contributing to "mirroring production" under Section 271. OSS Decl. ¶ 723. *See Georgia/Louisiana 271 Order* ¶ 189. Significantly, no CLEC has yet requested that Qwest code any additional error messages in SATE. OSS Decl. ¶ 723. Nor has the SATE Users' Group objected to the scope and type of error messages generated in SATE. *See* OSS Reply Decl. ¶ 364 n.513; Reply Exhibit LN-66 (May 21, 2002 Meeting Minutes of SATE Users' Group).

Perhaps the most compelling evidence of all that SATE offers CLECs an adequate test environment that mirrors production is that so many CLECs have achieved production status through successful testing in SATE. As indicated in the Application, as of June 1, 2002, a total of 16 CLECs had tested in SATE and gone into production (five of these through a service bureau). OSS Decl. ¶ 728. *See also* OSS Reply Decl. § VII(A). As of August 1, the total was 17 CLECs (four of which tested through a service bureau only). *Id.*

By way of comparison, the FCC found it compelling that three CLECs had successfully used the SBC testing environment and gone into production in the Texas Section

271 proceeding. *Texas 271 Order* ¶ 138. Here, the evidence is far stronger that SATE provides a successful test environment for CLECs. As the Commission has stated on numerous occasions, "actual commercial usage [is] the most probative evidence that a BOC is providing nondiscriminatory access to its OSS." *Texas 271 Order* ¶ 102; *New Jersey 271 Order* at App. C ¶ 31. 34/ Letters from two entities that have tested their software using SATE provide additional evidence that SATE mirrors production (Allegiance, a CLEC, and NightFire, a software vendor). Exhibits LN-OSS-79 and LN-OSS-80; OSS Reply Decl. at §VII(A).

As noted in the OSS Declaration, Qwest has further enhanced SATE's mirroring of production by providing automated post-order responses through VICKI (since January 26, 2002) and by implementing test flow-through components. 35/ OSS Decl. ¶¶ 708-710. Rather than acknowledging the options that these enhancements offer to CLECs, AT&T and WorldCom disparage them, suggesting, for example, that they do not sufficiently mirror production because a CLEC must choose a "path" to use VICKI. AT&T Comments at 37, 38-39; WorldCom Comments, Lichtenberg Decl. ¶ 107. Their argument reflects a misunderstanding of the nature of VICKI, which relies on predetermined test transactions with predetermined responses that verify a CLEC's code is working properly. *See* Reply Decl. § VII(E).

AT&T and WorldCom also contend that Qwest should put into SATE all products available in production, regardless of whether CLECs order them through EDI or in significant volumes and regardless of the fact that other possible SATE improvements might be more useful

34/ In the case of SWBT in Texas, there was no third party test of SWBT's interface testing environment. The Commission there stated that "in those substantive areas not covered by the Telcordia test, we rely instead on other evidence, such as actual commercial usage, to assess whether SWBT provides nondiscriminatory access to its OSS." *Texas 271 Order* ¶ 103. *See also Georgia/Louisiana 271 Order* ¶ 187 n.704 (CAVE test environment not subjected to third party test in Georgia, but FCC still approved it under Section 271).

to CLECs. AT&T Comments, Finnegan/Connolly/Menezes Decl. at ¶¶36, n.25, 91-94, 115; WorldCom Comments, Lichtenberg Decl. at ¶106. They would require Qwest to bypass completely the very change management process that the CLECs, including AT&T and WorldCom, developed collaboratively with Qwest. When SATE was launched in August 2001, it included all the resale and UNE products that CLECs were then ordering via EDI interfaces. CLECs could request to have additional products placed into SATE by submitting a change request. OSS Decl. ¶ 756. These CRs are prioritized along with the other SATE CRs. In fact, CLECs and Qwest have submitted a number of CRs to add products to SATE, and all but two were either prioritized relatively low or withdrawn for lack of interest. OSS Decl. ¶ 757-758; OSS Reply Decl. ¶ 392. AT&T and WorldCom would force these changes to take place over others valued more highly by CLECs, in violation of the CMP process. Section 271 does not require such an unreasonable result.

AT&T and WorldCom cite the closed unresolved status of two SATE-related exceptions by KPMG in the ROC OSS test as evidence that SATE does not mirror production (E3077) and that it does not provide testing for a sufficient range of products (E3095). The concerns raised in these exceptions are fully addressed in the OSS Declaration, and we need not repeat that explanation here. OSS Decl. ¶¶ 741-759. These issues also are discussed above and in the OSS Reply Declaration. *See* OSS Reply Decl. ¶¶ 390-393; Section VII(C). The commercial evidence of CLECs successfully testing in SATE should put to rest any remaining doubts raised by the closed unresolved KPMG exceptions.

AT&T and WorldCom also suggest that Qwest should not rely on the HP Arizona test because HP did not test VICKI or flow-through and did not conduct "production mirror

35/ The FCC has not required that these components be part of a test environment under testing" of SATE. AT&T Comments at 39 n.90; *see also* WorldCom Comments, Lichtenberg Decl. ¶ 109. First, in directing HP to conduct a further test of SATE for EDI release 9.0, the ACC Staff made a conscious decision that it was not necessary for HP to test either VICKI or flow-through, citing the evolutionary nature of SATE and the future development of PO-19B. OSS Reply Decl. § VII(G), citing Reply Exhibit LN-67 (ACC Impasse Issue, Master Issue #942).

Second, HP did find that Qwest's SATE is adequate to support CLEC testing in Arizona. HP Summary Evaluation Report (December 21, 2001), § 2.1, (Exhibit LN-OSS-83). As the Department of Justice noted in its Docket No. 02-148 Evaluation, "HP, through its transaction testing of SATE in Arizona, found the accuracy and consistency of SATE test responses to be adequate to support certification." *See* Docket No. 02-148 DOJ Evaluation, July 23, 2002, at 18, *citing* HP Summary Evaluation Report at 8. *See also* OSS Reply Decl. ¶ 394. HP's testing resulted in a number of specific recommendations, some of which specifically addressed the issues identified by AT&T and WorldCom in their comments here. *See* OSS Reply Decl. ¶¶ 394-398. Qwest has agreed to and has complied with every recommendation with the exception of two relating to an expansion of PID measure PO-19, which are in the process of being implemented. OSS Decl. ¶ 740. 36/

The first performance results of the new PID designed specifically to measure the extent to which SATE mirrors production (PO-19B) also support the conclusion that SATE satisfies the Section 271 standard. Preliminary results are now available for July (the first month

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Section 271. *See Texas 271 Order* ¶ 138.

36/ Even if the Arizona third party test did not evaluate every aspect of SATE, that does not mean the results are not relevant under Section 271. After all, the SBC test environment was found to satisfy Section 271 without any third party test results at all. *Texas 271 Order* ¶ 135.

in which PO-19B was measured), and show that Qwest achieved a 99% mirroring rate (above the benchmark of 95%). OSS Reply Decl. ¶ 397. Indeed, the Department of Justice relied in part on Qwest's preliminary performance in July under PIDs PO-19A and PO-19B in making its positive SATE recommendations in the instant Application. *See* DOJ Evaluation at 18 n.91 & 92.

In sum, the results of both the ROC and Arizona OSS tests, in combination with other evidence Qwest has presented on the effectiveness of SATE and the number of CLECs successfully testing in SATE, support a conclusion that SATE satisfies the requirements of Section 271.

Finally, AT&T and WorldCom argue that Qwest's other EDI test environment, the Interoperability environment, is not physically separate from the production environment, citing *Georgia/Louisiana 271 Order* ¶187. AT&T Comments at 36 and Finnegan/Connolly/Menezes Decl. ¶ 86; WorldCom Comments at 22-23 and Lichtenberg Decl. ¶ 103. As discussed in both the Opening and the Reply OSS declarations, however, not only is the Interoperability environment physically separate from the production environment, it is physically impossible for orders to be transmitted through to production from Interoperability, because there is no physical connection from the Interoperability systems to the provisioning systems. OSS Decl. ¶ 696; OSS Reply Decl. ¶ 386. The concerns articulated by CLECs that Interoperability has an adverse impact on production are unfounded (*e.g.*, the potential for orders to be provisioned or for the Interoperability environment to "crash" the production systems). *Id.* *See* AT&T Comments, Finnegan/Connolly/Menezes Decl. ¶¶ 81-87; WorldCom Comments, Lichtenberg Decl. ¶ 103. The Interoperability environment satisfies the FCC's requirement that the test environment should be physically separate from production. *See Georgia/Louisiana 271 Order* ¶ 187.

AT&T and WorldCom also argue that the Interoperability environment does not "mirror production" because some orders are processed manually. AT&T Comments at 36; WorldCom Comments, Lichtenberg Decl. ¶ 105. The orders are processed manually so that they do not flow through into production and cause test accounts to be provisioned. The lack of flow-through capability is not a flaw under Section 271, since the FCC has not required flow-through as a necessary part of the testing environment. *Texas 271 Order* ¶ 138. *See* OSS Reply Decl. ¶ 389 n.558.

In sum, both SATE and the Interoperability environment satisfy the FCC's requirement of a physically separate "stable test environment that mirrors production." *New Jersey 271 Order*, App. C ¶ 42.

VI. QWEST MEETS ALL OTHER CHECKLIST OBLIGATIONS

A. Checklist Item 1: Interconnection

1. Qwest Satisfies its Obligation to Provide Interconnection Trunking

Qwest's Application included a detailed discussion of its interconnection performance. None of the commenters raised concerns about Qwest's performance in that area. Although AT&T submitted comments on interconnection issues, the comments were limited to the precise scope of Qwest's legal obligation to offer interconnection to competing carriers. 37/ Section 271 proceedings, however, are not the appropriate forum to resolve such disputes. *See, e.g.*, *New Jersey 271 Order* at App. C ¶ 4.

37/ *See* AT&T Comments at 97-106 and Wilson Decl. ¶¶ 5-38. One of the matters raised by AT&T deals with the use of spare transport capacity. This issue is addressed below in the context of checklist item 13, as it is a financial issue rather than a structural one. Another issue raised by AT&T deals with charges for entrance facilities. *See* AT&T Comments at 97-99. This issue is addressed in the pricing section below.

First, AT&T contends that "if a CLEC forecasts a need for more trunks than Qwest *thinks* the CLEC will need, Qwest forces the CLEC to pay a construction deposit, which will not be returned if the CLEC's utilization falls below a certain threshold." AT&T Comments at 100. This is not true. Deposits are optional, not mandatory, and to date no CLEC in any state has elected to submit a deposit. *See* Freeberg Reply Declaration ¶ 7.

Unless a CLEC has an unbroken 18-month history of low average utilization of trunking that is already in place, the CLEC is not even a candidate for a deposit. *See, e.g.*, Washington SGAT 7.2.2.8.6. Moreover, CLECs choose whether or not to place deposits. For carriers whose agreements mirror the SGAT, submission of a deposit is optional to the CLEC. *Id.* § 7.2.2.8.6.1. Moreover, Qwest must refund any deposit if, after building in accordance with a CLEC's forecast, the CLEC achieves 50% trunk group utilization in any month in the six months after the end of the forecasting period to which the deposit applies. *Id.* § 7.2.2.8.6.1.1.

AT&T asserts, without any evidence, that "[t]he practical effect of these provisions is that CLECs scale back their facilities-based market entry to prevent excess blocking." *See* AT&T Comments at 102. Qwest's commercial performance results demonstrate that blockage on interconnection trunks is extremely rare, and is at parity with the retail analogue. *See* Commercial Performance Results under metric NI-1. AT&T does not address that fact. In short, AT&T's forecasting concerns are hypothetical and without foundation.

Second, AT&T asserts that "Qwest may unilaterally determine that a CLEC is underutilizing its trunks and 'snatch back' trunks back from the CLEC regardless of the CLEC's needs or plans for the trunks it holds and for which it pays." AT&T Comments at 102. Again, AT&T overstates its case. The SGAT provides, in § 7.2.2.8.13, that "Qwest *may* reclaim the unused facilities and rearrange the trunk group." Qwest has never exercised its rights under that provision. Typically, when underutilization reports provided by Qwest indicate the potential need to reduce the size of the trunk group, CLECs have voluntary agreed to a trunk group size reduction. This voluntary approach to trunk group size reduction has worked well during the past several years. *See* Freeberg Reply Declaration ¶ 14.

Third, AT&T argues that "Qwest's SGATs in Montana and Wyoming (§ 7.2.2.9.3.2) prohibit CLECs from placing interconnection traffic on the trunk groups they have already established to carry toll traffic." AT&T Comments at 103. This issue does not pose competitive problems for AT&T in any of the application states. The Utah and Washington SGATs allow for the complete combining of traffic that AT&T seeks. In Montana, AT&T's interconnection agreement with Qwest contemplates the combining of different types of traffic on interconnection trunks. 38/ In fact, interconnection trunk groups in Montana now carry a mix of traffic types.

The Wyoming SGAT provisions that AT&T attacks are not discriminatory. Qwest has long maintained one set of trunk groups to carry exchange access traffic for interexchange carriers and a second set for its own local traffic. *See* Freeberg Reply Declaration ¶ 20.

Finally, AT&T argues that "Qwest's SGATs in Washington, Utah, and Wyoming also arbitrarily limit the length of interconnection trunks that it will construct between Qwest switches to 50 miles. In other words, when a CLEC wishes to purchase interconnection trunks that would involve transport of more than 50 miles between Qwest switches, and Qwest lacks

38/ The AT&T interconnection agreement states, "If Local Traffic and Toll Traffic are combined in one (1) group, AT&T shall provide a measure of the amount of Local and Toll traffic relevant for billing purposes to U S WEST." *See* Qwest/AT&T Montana interconnection agreement at § 8.2.1. This agreement (and the others discussed here) appears in Attachment 5, Appendix L to Qwest's Application.

adequate capacity on such a route, Qwest requires the CLEC to build the additional capacity for Qwest." AT&T Comments at 105.

The regulatory authorities in Utah and Wyoming approved a compromise proposed by Qwest. In those states, when a CLEC seeks direct trunked transport in excess of 50 miles and the parties cannot agree on an appropriate cost sharing arrangement, the parties may submit the issue to the state commission for resolution. There is no contractual limit on the length of direct trunked transport in those states. *See* Freeberg Reply Declaration ¶ 23.

The Washington Commission approved SGAT language that requires Qwest to provide direct trunked transport up to 50 miles where Qwest does not have existing facilities. Beyond 50 miles, CLECs may be required to construct facilities to the mid-point of the span. That limitation is reasonable. When neither carrier has available facilities between the respective carriers' switches that need to exchange calls, each carrier is on equal ground. In that case, one carrier or the other carrier (or both) must construct facilities. When the carriers agree to a mid-span meet, neither carrier bills the other for reciprocal compensation associated with local transport. If AT&T provides the entire facility, it will bill Qwest for the transport it provides. When Qwest provides the entire facility, it will bill AT&T for the transport it provides. AT&T may decide which option is best for the interconnection. AT&T has not adduced any evidence that the SGAT provision in Washington has had an adverse effect on competition. *Id.* ¶ 25.

2. Qwest Provisions Collocation in a Manner Consistent with Section 271

Qwest has established that it provides adjacent collocation in a manner consistent with the Act and FCC requirements. Qwest Br. at 34; Bumgarner Collocation Decl. ¶¶ 36-38. *See also* SGAT §§ 8.1.1.6, 8.2.6 *et seq.*, & 8.4.6 *et seq.* Alone among all commenters, Eschelon contends that Qwest's collocation offerings are inadequate because, it complains, Qwest does not provide "off-site" adjacent collocation. 39/ Eschelon's contentions are without merit.

Neither the Act nor the Rules require a BOC to provide collocation space in or on a third party's property. The Act by its terms requires the provision of collocation only "at the premises of the local exchange carrier." *See* 47 U.S.C. § 251(c)(6). In implementing this provision, the FCC determined that ILECS should be required to provide "adjacent collocation," to wit, they "make available, where physical collocation space is . . . exhausted . . . collocation in adjacent controlled environmental vaults [or] huts, or similar structures located at the [ILEC] *premises*." 47 C.F.R. § 51.323(k)(3) (emphasis added). The term "premises," in turn, is defined to include only an ILEC's central offices and serving wire centers; buildings or similar structures owned, leased or otherwise controlled by the ILEC that house its network facilities; structures that house ILEC facilities on public rights-of-way; and land owned, leased, or otherwise controlled by an ILEC adjacent to the above-listed categories of property. 47 C.F.R. § 51.5. *See Advanced Services Reconsideration Order*, 15 FCC Rcd at 17828, ¶ 42 (the term "premises of the local exchange carrier" in Section 251(c)(6) encompasses only property that is "owned, leased, or controlled by an [ILEC] as well as any [ILEC] network structure on such land"). 40/

The law is clear that the definition of "premises" under the Act and the Rules excludes "off-site" areas that are not owned or controlled by the ILEC – precisely the areas in

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39/ Eschelon Comments at 41-42. Eschelon also alleges that Qwest uses interconnection agreement amendments as a tool to delay competitors or extract unapproved rates. *Id.* at 42. As demonstrated in the Reply Declaration of Margaret Bumgarner, Eschelon is mistaken on the facts, and there is no merit to Eschelon's complaint. Bumgarner Reply Decl. ¶¶ 9-12.

40/ In effect, the arrangement Eschelon seeks is not really "collocation" at all, adjacent or otherwise, because it would require access to property that is *not* owned, leased or controlled by Qwest. Eschelon is, of course, free to secure space and locate equipment in or on property that is close to or adjacent to Qwest's property but that is not owned or controlled by Qwest.

which Eschelon believes it is entitled to "adjacent collocation." Eschelon's contention should be rejected. 41/

B. Checklist Items 2, 4, 5 and 6: Unbundled Network Elements

Certain commenters raise several issues with respect to unbundled network elements. None of these issues should stand in the way of approval of Qwest's Application, however, because no commenter has demonstrated that Qwest's policies are inconsistent with the final decisions of the State Authorities or with federal law. Furthermore, some of the issues raised by commenters are not appropriately considered in a Section 271 proceeding at all.

For example, AT&T alleges that Qwest's packet switching offering is insufficient. *See* Reply Declaration of Karen A. Stewart ("Stewart Reply Decl.") ¶¶ 62-70. However, AT&T's allegations are of a type that the Commission has previously declined to address. In the *Kansas/Oklahoma Section 271* case, the Commission declined to resolve a packet switching complaint on ripeness grounds because no CLEC had ordered packet switching from SBC. *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6363-64 ¶ 245. The same can be said here: no CLEC has ordered packet switching in any of Qwest's states. AT&T's concern, therefore, is theoretical at best.

41/ The remaining collocation issues that Eschelon purports to raise, by way of attaching certain of its responses to discovery propounded by the Minnesota Department of Commerce ("DOC") in that state's Section 271 proceeding, are equally insubstantial. As Qwest has shown, for example, its forecasting and space reservation policies have been litigated at length and properly decided in the Multistate process and by the State Authorities. *See, e.g.*, Bumgarner Collocation Decl. ¶ 28 (citing *Washington Commission Fifteenth Supplemental Order* at ¶¶ 66-70; *Wyoming Commission Group 2 Order*; *Montana Commission Final Report on Collocation* at 29) & ¶ 32. Otherwise, these collocation issues were already addressed through the CMP based on consensus reached in the states' Section 271 workshops or decisions by the applicable State Regulators. *See* Bumgarner Reply Decl. Section II.B.

AT&T purports to rely on the WCB's recent Virginia Arbitration decision in arguing that Qwest must count lines on a per-location basis when determining applicability of the switching carve-out. AT&T Comments at 112-13; *see also Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket No. 00-218, ¶¶ 360-63 (July 17, 2002). 42/ But AT&T's reliance on that decision is misguided. In the first place, the Virginia Arbitration order had not yet been issued when Qwest filed its Application in this proceeding. Even if the Bureau's order were binding on nonparties to the arbitration, it would be inappropriate to apply it retroactively. Furthermore, Qwest's position on this issue is different from the position Verizon took in that proceeding. Verizon proposed to count all of a customer's lines in an entire LATA, whereas Qwest counts only a customer's lines within a single Density Zone One wire center.

With respect to the following issues, Qwest's positions are consistent with Commission requirements and with the final orders of each of the State Authorities. Therefore, they should not impede a grant of authority under Section 271.

1. Qwest's Policy Regarding Construction of New Facilities/Held Orders Is Reasonable

The Act defined UNEs for the purpose of giving CLECs access to the ILEC's "existing" network. AT&T's claim that Qwest should be required to construct facilities for CLECs is simply wrong. This Commission has never expressly imposed construction requirements in all circumstances on ILECs, and, not surprisingly, commenters have failed to

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42/ WorldCom makes a similar argument that is equally unconvincing with respect to customized routing. Simpson Reply Decl. ¶¶ 39-50.

cite to any such requirement. The Act was not designed to force ILECs to build networks for CLECs; indeed, in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), the court held that CLECs are entitled to unbundled access only to Qwest's *existing* network:

> We also agree with the petitioners' view that subsection 251(c)(3) implicitly *requires unbundled access to only an incumbent LEC's existing network*, not to a yet unbuilt superior one. [Emphasis added.]

The court emphasized that the requirement of nondiscriminatory access to unbundled network elements does not mean that ILECs are obligated to satisfy every desire of every requesting carrier. Requiring Qwest to become a construction company for CLECs would be contrary to the public policy goals of the Act because it would discourage facilities-based competition by eliminating any incentive for CLECs to construct their own competing networks.

As described in Qwest's Application, *see* Simpson/Stewart UNEs Decl. ¶¶ 20-25, Qwest attempts to locate compatible facilities for CLECs, performs incremental facility work to make UNEs available, and will hold CLEC orders for a reasonable period of time. Qwest believes its 30-business-day hold period is a reasonable period of time to allow the CLEC to access any facilities that become available during the service order hold period. In an effort to locate facilities, Qwest has created standard facility assignment processes for both copper and fiber facilities. Stewart Reply Decl. ¶ 5.

In compliance with the WUTC's resolution of the impasse issue on treatment of held orders, the Qwest Washington SGAT includes an obligation to construct facilities in the same manner in which Qwest constructs facilities for retail and to keep CLEC orders open, pending availability of facilities, at parity with retail customers' orders. Washington SGAT § 9.1.2.1.3.2.

When no facilities are located, Qwest holds the CLEC's order for 30 business days and continues to attempt to assign compatible facilities. If a facility becomes available during this 30-business-day period, the order will be released and installed on a first-come, first-served basis for retail and wholesale orders. The CLEC must approve the activity prior to installation of the CLEC order. If after 30 business days compatible facilities still are not available, Qwest will reject the order and inform the CLEC that no compatible facilities exist. 43/ At any time, the CLEC has the option to ask that Qwest construct the facilities according to the special construction process outlined in the SGAT. 44/

Qwest first added the 30-business-day hold period described above to its Montana SGAT to address concerns about Qwest's held order policy expressed by CLECs in the Montana Section 271 proceedings. In an ex parte submitted in the WC Docket No. 02-148 proceeding on June 20, 2002, Covad expressed approval of this new policy. 45/ Qwest plans to incorporate this policy into its Utah and Wyoming SGATs as updated SGATs are filed in the normal course. Through its Change Management Process, Qwest notified CLECs of the 30-business-day hold policy by incorporating the policy into its online PCAT. Already, however, the 30-business-day hold policy has been implemented as Qwest's practice in Montana, Utah, and Wyoming.

43/ After 30 business days the CLEC may submit a second order, and Qwest will continue to attempt to assign compatible facilities for another 30 business days. As noted above, the Washington SGAT requires that delayed CLEC orders remain open, pending availability of facilities, at parity with retail customer orders. In Washington, therefore, CLEC orders may be held for a different period of time than the standard 30 business days. It is important to note that Qwest fills the vast majority of loop orders it receives from CLECs. A snapshot of Qwest's internal regional data for May 2002 demonstrates that more than 99% of CLEC inward orders for unbundled loops were fulfilled.

44/ SGAT § 9.19. In addition, Qwest provides notification of major facility builds through its ICONN database. SGAT § 9.1.2.4. CLECs can submit orders against these planned builds, and those orders will not be rejected.

45/ Covad ex parte submission, WC Docket No. 02-148, June 20, 2002 ("In Montana, Qwest proposed SGAT language that, in Covad's view, would alleviate much of [Covad's] concerns about the held order policy.").

As for federal guidelines on the obligation to build, Qwest's position is at least comparable to that of Verizon, as described in the Commission's *Pennsylvania 271 Order*, 6 FCC Rcd at 17469-70 ¶ 91. In addressing CLEC complaints about Verizon's policies, the Commission stated, "[N]ew interpretative disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding." *Id.* at 17470 ¶ 92. Furthermore, the Commission has identified the obligation to build new UNEs as an open issue and has expressed its intention to address the issue in its triennial UNE review. *Triennial UNE Review NPRM*, 16 FCC Rcd at 22811 ¶ 65. *See Kansas/Oklahoma 271 Order* ¶ 19 (the "narrowly focused adjudications" undertaken in the Section 271 context are inappropriate for the resolution of "new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors"). Qwest's build policy therefore is consistent with existing federal law.

AT&T also contends that Qwest should be required to add or upgrade electronics for the purpose of providing dedicated transport. AT&T Comments, Wilson Decl. at 21-22. For unbundled dedicated transport, if electronics are currently available, Qwest includes the existing electronics as part of the overall facility request. However, Qwest does not agree to add or upgrade electronics for dedicated transport.

Qwest's position is consistent with the Commission's unwillingness to impose on ILECs an obligation to construct new facilities for the provision of unbundled transport. 46/ The

46/ *See, e.g.*, *Local Competition First Report and Order*, 11 FCC Rcd at 15722 ¶ 451 ("[W]e expressly limit the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities.") (emphasis in original).

Commission has clearly stated that ILECs do not have an obligation to build a transport network for CLECs:

> In the *Local Competition First Report and Order*, the Commission *limited an incumbent LEC's transport unbundling obligation to existing facilities*, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.

UNE Remand Order, 15 FCC Rcd at 3843 ¶ 324 (emphasis added).

Qwest agrees in section 9.1.2.3 of its SGAT to perform incremental facility work, including carding existing electronics. However, adding electronics at a CLEC's request is not incremental facility work. The cost of such electronics is significant and involves capital construction, engineering and installation. For example, the addition of "electronics" can mean anything from a multiplexing unit to a digital cross connect device. In the case of placing an FLM-150 multiplexer, for example, the actual material and placing costs are $36,880 per node, assuming that all supporting framework and power are in place in the central office. Installation of a digital cross connect device, meanwhile, can cost in excess of *$1 million.* 47/ In network construction jobs such as these, floor space must be acquired, infrastructure evaluated, and power needs assessed. The process can take four to five months to complete. These are precisely the types of construction jobs to build network capacity that Qwest cannot reasonably be expected to perform upon request.

47/ For example, a recent installation of a Titan 550 digital cross connect at Qwest's Columbine, Colorado central office cost $1,237,053.

The same can be said of "upgrading" existing electronics to add capacity to the network. Again, AT&T implies that an upgrade in electronics is a simple and inexpensive method of adding capacity, when in fact an upgrade of interoffice transport facilities can be an expensive operation. For example, if an existing OC-12 is at exhaust, upgrading to an OC-48 would indeed add capacity, but at a cost of $98,806 per node, with a node needed at each end.

AT&T also asks that Qwest be required to light dark fiber. AT&T Comments, Wilson Decl. at 21-22. Qwest makes dark fiber available to CLECs as required by Commission rules. CLECs can light that dark fiber and create dedicated transport at virtually the same cost that Qwest would incur. Alternately, to the extent that a CLEC wants Qwest to add electronics to dark fiber, the CLEC can make such a request under the special construction provisions in SGAT section 9.19. Qwest can then evaluate the CLEC request and make an informed decision about any network expansion plans.

AT&T would prefer to force Qwest to incur significant up-front investments in order to bankroll CLEC expansions. Moreover, there is no assurance that the CLEC would not disconnect the dedicated transport circuits a short time after installation, leaving Qwest and its ratepayers responsible for recovering the cost of lighting dark fiber at the CLEC's request.

The Commission defines dark fiber as "fiber that has not been activated through connection to the electronics that 'light' it." *UNE Remand Order*, 15 FCC Rcd at 3776 (¶ 174); *see also id.* at 3843 (¶ 325). By definition, therefore, dark fiber does not have electronics attached to it; electronics must be added to light the dark fiber in order for it to provide dedicated transport. The Commission has stated that the obligation to add electronics belongs to the CLEC leasing the fiber. 48/ AT&T's position that Qwest is required to light dark fiber is an attempt to circumvent the FCC's holding that ILECs are not required to build dedicated transport facilities. *UNE Remand Order*, 15 FCC Rcd at 3843 ¶ 324. As the WCB recently noted, the Act "does not require [ILECs] to construct network elements, including dark fiber, for the sole purpose of unbundling those elements for AT&T or other carriers." 49/ The Commission should reject any attempt by AT&T in this proceeding to erode the Commission's position on this issue.

Throughout the development of its build and held order policies, Qwest has considered and addressed CLEC concerns. Qwest's resulting policies are completely consistent with Commission precedent and with the final decisions of the states included in this Application.

2. The State Authorities Have Uniformly and Properly Concluded That the Local Use Restriction May Appropriately Be Applied to Dark Fiber

AT&T challenges Qwest's policy of applying the Commission's local use restriction to dark fiber when it makes up part of an enhanced extended loop ("EEL"). AT&T Comments at 102. AT&T contends that local use restrictions have "no possible application to dark fiber, because CLECs by definition always light (and generally combine) unbundled dark fiber themselves." *Id.*

AT&T mischaracterizes Qwest's position on this issue. Qwest does not apply the Commission's local use restriction for EELs to dark fiber in all cases, as AT&T implies, but only

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48/ *Id.* at n.292 ("The [carrier] leasing the fiber is expected to put its own electronics and signals on the fiber.") (quoting definition of dark fiber in Newton's Telecom Dictionary, 14th ed.).

49/ *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket No. 00-218, ¶ 468 (July 17, 2002).

when the dark fiber in question is provided as part of an EEL. Section 9.7.2.9 of Qwest's SGAT makes this clear:

> CLEC shall not use [dark fiber] that is part of a Loop transport combination, as a substitute for special or switched Access Services, except to the extent CLEC provides "a significant amount of local exchange traffic" to its end users over the [dark fiber] as set forth by the FCC (See 9.23.3.7.2).

Upon request, Qwest will make a combination of a dark fiber loop and a dark fiber transport network element for a CLEC in the serving wire center of the loop via any technically feasible method of combination, such as a cross connect via a Fiber Distribution Panel ("FDP"). 50/ Although CLECs have at times suggested that Qwest would never be called on to provide a dark fiber EEL, Qwest can in fact Qwest combine a dark fiber loop and a transport UNE without lighting the dark fiber (in other words, without installing the electronics necessary to provide telecommunications services). The CLEC would be required to place suitable electronics at the end-user end of the loop and at the distant end of the transport UNE to light the dark fiber EEL.

Qwest has received several Initial Records Inquiries (IRIs) for dark fiber EELs from CLECs using the Special Request Process. As of August 1, 2002, Qwest had provisioned one dark fiber loop and dark fiber transport combination in the state of Minnesota, and none in any other state in its region.

50/ The Initial Unbundled Network Elements Declaration of Lori A. Simpson and Karen Stewart states that a CLEC may ask for any combination of network elements. Simpson/Stewart UNEs Decl. at 17. A dark fiber EEL would be considered a UNE combination that Qwest currently combines in its network, but for which there is no standard product developed. To order a dark fiber EEL, the CLEC therefore would submit a Special Request Process ("SRP") form. The Initial Dark Fiber Declaration of Karen A. Stewart confirms that Qwest provides access to dark fiber both in the loop and interoffice transport network. Stewart Dark Fiber Decl. at 4.

The Commission has not specifically addressed the applicability of the local use restriction to EELs that consist partly of dark fiber. However, the Commission's rationale for authorizing this restriction applies no less forcefully to dark fiber EELs. In its *Supplemental Order Clarification*, the Commission explained that it imposed the local use restriction to prevent unbundling requirements from interfering with access charge and universal service reform. *EEL Supplemental Order Clarification*, 16 FCC Rcd at 9588 (¶ 2). In other words, an unfettered unbundling obligation would have erased substantial amounts of access charge revenues, which have historically provided implicit subsidies that are necessary to maintain the goals of universal service. Unlimited access to EELs made of dark fiber as a substitute for special access services would similarly interfere with the access charge regime. It is therefore appropriate that the local use restriction apply to EELs that include dark fiber in the same way that it applies to EELs that do not include dark fiber components. The Multistate Facilitator articulated this point well in his recommended resolution of the issue:

> There is no doubt that a loop-transport combination that includes dark fiber remains a loop-transport combination. The logic behind the FCC's concern about access charges is in no way diminished because the facilities providing the combination were unlit before a CLEC gained access to them. 51/

In short, Qwest's treatment of dark fiber EELs is consistent with the policy considerations outlined in the Commission's *Supplemental Order Clarification* and with the final decisions of the State Authorities. 52/

51/ *Multistate Facilitator's Report on Emerging Services* at 57. All of the application states approved Qwest's position on this issue. *See* Stewart Dark Fiber Decl. at ¶ 35.

52/ AT&T erroneously contends that the unbundling requirements of Section 251(c)(3) pertain to corporate affiliates of Qwest Corporation ("QC"). AT&T Comments at 85-88. But the unbundling obligations of Section 251(c)(3) apply only to ILECs. 47 U.S.C. § 251(c). As the only ILEC in the Qwest family of entities, only QC is subject to the unbundling requirements of Section 251(c)(3). To the extent AT&T is asking this Commission to impose a new obligation

C. Checklist Item 7: Directory Assistance and Operator Services

In its Comments, WorldCom complains for the first time (save for a single issue raised in the Colorado cost docket) about Qwest's customized routing ("CR") offering. *See* Simpson Reply Decl. at 24. In fact, WorldCom first submitted its request to Qwest in April 2002. *Id.* Qwest's CR offering has been approved by all of the State Authorities, and Qwest has concrete legal obligations to provide CR as part of its SGAT and state-approved interconnection agreements. Qwest stands ready to provide customized routing to WorldCom in the nondiscriminatory manner specified in WorldCom's interconnection agreements and has undertaken a bench test that demonstrates it is capable of doing so. Simpson Unbundled Switching Decl. at 24-25. WorldCom's request, to the extent that it warrants regulatory intervention, should be resolved at the state level as an interconnection agreement interpretation matter. Certainly, it is not an appropriate issue to raise for the first time at the federal level in the context of Qwest's Section 271 Application.

WorldCom also makes much of the WCB's arbitration decision in the *Verizon Virginia Arbitration Order*. *See* WorldCom Comments at 37. But WorldCom's reliance on that decision is misguided for a variety of reasons. First, as noted above, the *Verizon Virginia Arbitration Order* was not in effect when Qwest filed its Application in this proceeding. Second, Verizon's (and BellSouth's) AIN-based CR offerings are fundamentally different from Qwest's line class code CR solution; thus the WCB's decision and the Commission's *Second Louisiana*

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on ILECs, this Section 271 proceeding is not the appropriate place to do so. *See, e.g.*, *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6246-47 ¶19.

Each of the State Authorities has decided this issue in Qwest's favor, *see* Stewart Dark Fiber Decl. ¶ 34, and, in any event, Qwest's SGAT includes a commitment to make available to CLECs any dark fiber to which Qwest has obtained a right of access, whether owned by an affiliate or not. SGAT § 9.7.1. With this commitment, Qwest is in full compliance with the State Authorities' resolution of this issue and with applicable federal law.

271 Order on AIN-based offerings do not apply here. Third, the WCB's decision was rendered in the context of an interconnection arbitration proceeding - precisely the forum in which WorldCom should raise this issue if it believes itself aggrieved. If WorldCom does not believe that Qwest is offering CR pursuant to the terms of its interconnection agreement, it should invoke its right to arbitration before the appropriate state regulatory body, rather than attempt to end run the State Authorities by inappropriately raising its interconnection agreement dispute in the context of this Section 271 proceeding.

In addition, WorldCom's request for 411 presubscription exceeds what Qwest is required to do in the context of Checklist Item 6 and CR. *See* Simpson Reply Decl. at 30-31. WorldCom demands that Qwest procure a secure software license for a switch feature from Lucent Technologies and implement that feature, which is referred to in the Lucent product materials as "presubscription for alternate local service provider to access directory assistance, operator assistance, or other local services." *Id.* at28. Such calls thus would be handled in Qwest's network in the same manner that equal access FGD signaled intraLATA and interLATA calls are handled. *Id.*. This Lucent Technologies software is available for Qwest 5E switching only. *Id.* at 30. Nortel and Ericsson have not yet developed similar software or features for Qwest DMS-10, DMS100 or AXE switches. *Id.*

A Notice of Proposed Rulemaking regarding 411 presubscription is pending before the Commission. 53/ Qwest is not able to divine any difference between what WorldCom seeks *via* the Commission's *411 Presubscription NPRM* and WorldCom's present request to Qwest. Thus, to the extent the Commission feels obligated to address WorldCom's CR request,

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53/ *Provision of Directory Listing Under the Communications Act of 1934, As Amended, The Use of N11 Codes and Other Abbreviated Dialing Arrangements, Administrations of the North* it should do so in the context of the pending Commission *411 Presubscription NPRM*, not in connection with this Section 271 Application.

D. Checklist Items 9 (Numbering Administration) and 11 (Local Number Portability)

OneEighty misattributes two isolated incidents involving NPA/NXX assignments as alleged failures on Qwest's part to comply with Checklist Item 11 (local number portability). *See generally* OneEighty Comments at 9-16. With respect to the first incident, as OneEighty itself acknowledges, the NANPA – not Qwest – mistakenly processed OneEighty's November 2001 NPA/NXX reassignment request as a cancellation or code return. OneEighty Comments at 9-10; Bumgarner Reply Decl. at 11-15 and Reply Exhibits MSB-1 and MSB-2. The subsequent service problems suffered by OneEighty in July 2002 also resulted from the NANPA's initial error. Bumgarner Reply Decl. at 11-15. These service problems were not caused by Qwest, yet Qwest went to considerable effort to assist the NANPA in correcting these errors in a timely manner. *Id.* It is important to note that OneEighty shoulders a significant part of the blame for these service problems, as it did not take any corrective action for nearly eight months, despite receiving direct notification from various sources, including the NANPA. *Id.* at 13-15. OneEighty could have taken action with the NANPA to rectify the error before the changes were scheduled to occur. *Id.*

The second issue of which OneEighty complains involved a translations error during Qwest's implementation of changes in selected route indexes in its Billings, Montana switches. Bumgarner Reply Decl. at 15. Qwest took action promptly upon receipt of the trouble report and restored the service in approximately one hour. *Id.* This one, dated, isolated incident

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American Numbering Plan, Notice of Proposed Rulemaking, CC Docket Nos. 99-273, 95-105, 92-237, FCC 01-384 (rel. Jan. 9, 2002) ("*411 Presubscription NPRM*").

in Montana does not support a conclusion that Qwest has ongoing problems with its provisioning of LNP.

In fact, OneEighty's complaints do not involve LNP at all, but rather numbering administration. Qwest is not responsible for numbering code assignment functions. With respect to Qwest's performance of its numbering administration obligations, it performed in complete accordance with the industry's guidelines and at the direction of the NANPA. Even were Qwest's provisioning of LNP at issue – which it is not – Qwest's LNP performance in the application states is excellent and belies OneEighty's allegations.

E. Checklist Item 13: Reciprocal Compensation

Only AT&T challenges Qwest's satisfaction of Checklist Item 13. Its sole claim – that Qwest does not proportionally price flat-rated transport optionally used to carry both toll and local traffic (AT&T Comments at 103-105) – was extensively considered and correctly rejected by the Multistate Facilitator and all but one of the Regulatory Authorities. The Commission therefore should find that Qwest satisfies Checklist Item 13.

There is no basis for AT&T's claim that "Qwest effectively prevents the efficient use of spare private line facilities for interconnection trunks by charging the CLEC private line rates for interconnection trunks if interconnection trunks and private line trunks are combined on the same facility." AT&T Comments, Wilson Affidavit ¶ 30. This position misstates the facts. First, Qwest's SGAT allows, rather than prevents, the optional use transport as described by AT&T. *See* SGAT § 7.3.1.1.2. Qwest assesses *no additional charge* when a CLEC uses spare facilities in the manner AT&T describes. 54/ The flat-rated charge for the facility does not

54/ Remarkably, AT&T either does not understand that Qwest imposes no additional charges in this circumstance or it is requesting a reciprocal compensation rate lower than zero.

change when local traffic is added. Moreover, while Qwest's interstate special access tariff explicitly prohibits proportional pricing, 55/ the FCC has considered and specifically rejected the proportional pricing scheme sought by AT&T, 56/ which would be tantamount to impermissibly attempting to change the rates for a federally tariffed exchange access service. *See* 47 U.S.C. § 251(g).

The Commission confirmed both in the *Local Competition Supplemental Order Clarification* and in a more recent adjudication that the "ratcheting" of rates for interconnection trunks down to TELRIC levels for local interconnection is impermissible. 57/ In *Net2000 Communications*, the Commission explained that the type of ratcheting AT&T seeks, when local and long-distance services are commingled on the same DS3 circuit, is clearly prohibited:

> There is no provision anywhere in the [*Local Competition*] *Supplemental Order Clarification*, or in prior orders for "ratcheting." * * * * Although Net2000 argues that it would be better if CLECs were permitted to convert only the parts of their DS3s that are used to provide local exchange service and to continue to obtain the remaining parts of the DS3s by tariff, this clearly is not permitted[.] 58/

55/ Qwest Tariff F.C.C. No. 1, Section 2.7.1 ("[Private Line Transport Service] and Local Exchange Service may be provided on a Shared Use facility. However, individual recurring and nonrecurring charges shall apply for each PLTS and local Exchange Line. *The Shared Use facility is not apportioned.*") (emphasis added).

56/ *See* AT&T Comments, Wilson Affidavit ¶ 30 ("Proportional pricing can be used to appropriately charge the CLEC for the two types of traffic.").

57/ *Local Competition Supplemental Order Clarification*, 15 FCC Rcd 9587, 9588-99, ¶ 22; *Net2000 Communications, Inc. v. Verizon-Washington, D.C., Inc.*, 17 FCC Rcd 1150 (2002) ("*Net2000 Communications*").

58/ *Net2000 Communications*, 17 FCC Rcd 1150, ¶ 28; *see also Local Competition Supplemental Order Clarification*, 15 FCC Rcd at 9602, ¶ 28 ("We further reject the suggestion that we eliminate the prohibition on 'co-mingling' (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above. We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access[.]").

This issue has been resolved in each state's Section 271 workshop. Qwest's practices are consistent with the State Authorities' workshop recommendations 59/ and are not violative of Section 271, as AT&T claims. The Multistate Facilitator found that Special Access rates are part of a delicately balanced rate system that supports universal service. *Multistate Workshop One Final Report* at 13. To alter that system would upset the balance. The Facilitator therefore properly concluded that CLECs can use special access circuits for interconnection, but should continue to pay the tariff rate for those circuits. *Id.* Each State Authority agreed, except for the WUTC. 60/ In Washington, Qwest made the required SGAT revisions, though it disagreed with the WUTC's conclusion, and it received state approval of the revisions. *See* note 58, above. Any attempt by AT&T to relitigate the issue here is both inappropriate and, as demonstrated above, lacking any factual or legal foundation.

59/ There is no basis for AT&T's suggestion that Qwest has not complied with the WUTC's resolution of this issue. AT&T Comments, Wilson Affidavit ¶ 31 ("although the Washington Commission ordered Qwest to allow interconnection to be combined with special access traffic, Qwest's proposed language . . . excluded special access trunks that are ordered under federal tariff"). To be sure, Qwest limited proportional pricing to situations where CLECs purchase trunks out of Qwest's intrastate access tariff, on grounds that state commissions lack jurisdiction over rates for special access trunks in tariffs filed with the FCC, but the Washington Commission expressly accepted the SGAT revision and Qwest's explanation. *See* Freeberg Reply Decl. ¶ 32 (citing *WUTC 34th Supplemental Order* ¶ 22 ("We agree that [we] may not assert jurisdiction over the pricing of interstate facilities, and cannot order Qwest to apply proportional pricing to those facilities. Therefore, we find Qwest's proposed SGAT language to be compliant[.]")).

There also is no merit to AT&T's assertion, offered without any support or analysis, that the WUTC incorrectly held that a state commission lacks jurisdiction to order Qwest to modify its charges for services ordered out of its interstate access tariff on file with the FCC. AT&T Comments at 105. The WUTC's opinion on its own jurisdiction appropriately recognized the absence of state authority over interstate access services, and AT&T's one-sentence claim to the contrary offers no meaningful explanation of how a WUTC decision regarding Qwest's charges under an FCC tariff could avoid exceeding the state commission jurisdiction. *See also* Freeberg Reply Decl. ¶ 32 n.26.

60/ *Compare Wyoming PSC Order on Group 2 Checklist Items* at 20; *Montana PSC Final Report on Qwest's Compliance with Checklist Item 13: Reciprocal Compensation* at 22-23, *with WUTC 26th Supplemental Order*, ¶¶ 13-16. *See* Attachment 5, Appendix C.

F. Checklist Item 14: Resale

AT&T, noting that the matter is the subject of Qwest's pending Petition for Declaratory Ruling, nevertheless complains that Qwest fails to make available for resale the bulk DSL transmission services that it provides to Microsoft Network, L.L.C. ("MSN"). *See* AT&T Comments at 119-121; *see also* WorldCom Comments at 29-30 (asserting that Qwest does not provide DSL service to an end user customer who has selected a CLEC for UNE-P voice service). AT&T does not deny that Qwest has no cognizable resale obligation under Section 251(c)(4) with respect to either (1) bulk DSL transmission services that it provides to ISPs such as MSN, *see* 47 C.F.R. § 51.605(c), or (2) bundled DSL information services sold (by either an ISP or Qwest) to end users. *See* Qwest Br. at 112 n.52. 61/ Nonetheless, AT&T argues that, because Qwest serves as MSN's marketing and billing agent with respect to the bundled DSL *information* service that MSN sells to end users, Qwest has become a retail provider of the distinct DSL *transmission* service that it sells in bulk on a *wholesale* basis to MSN. But any interactions that Qwest may have with the end user consumers of MSN's DSL *information service* could not transform the separate bulk DSL *transmission* service that Qwest sells to MSN into a "retail" service. Stated differently, AT&T cannot point to any service that is simultaneously (1) a "telecommunications service" (as opposed to an "information service") *and* (2) a service that Qwest could be said to provide "at retail." In any event, as Qwest explained in its Petition for Declaratory Ruling, MSN, not Qwest, has the retail relationship with the end users

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61/ *See also Second Report and Order*, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237 (1999), *aff'd*, *Association of Communications Enterprises v. FCC*, 253 F.3d 29 (D.C. Cir. 2001); *Arkansas/Missouri 271 Order*, 16 FCC Rcd at 20758-60 ¶¶ 79-82.

as well. 64/ Qwest's opponents nonetheless raise several additional pricing-related arguments. These fall into three major categories: (1) those that challenge the benchmarking methodology itself, particularly with respect to rates in Montana and Wyoming; (2) those that challenge the distance-based deaveraging schemes in Montana and Wyoming, and (3) those that challenge the non-zero rates in Washington (as well as in Montana and Wyoming) for the high-frequency portion of the loop.

A. Qwest's Opponents Present No Basis for Challenging the Application of this Commission's Benchmarking Methodology to Montana, Utah, Washington, or Wyoming

1. Qwest Permissibly Followed Commission Precedent in Using Standardized, Rather than State-Specific, Minutes of Use

AT&T and WorldCom renew their claim, first presented in the Docket No. 02-148 proceeding, that an appropriate benchmark methodology must use state-specific data on total minutes of use ("MOUs"). AT&T Comments at 54-58 and Lieberman/Pitkin Decl. at 8-16; WorldCom Comments at 32-35 and Frentrup Decl. at 6-13. Qwest has fully rebutted this argument in its Docket No. 02-148 reply comments. In a nutshell, the standardized MOU assumptions used by Qwest are the same ones used by the Commission in prior Section 271 proceedings, *see Pennsylvania 271 Order*, 16 FCC Rcd at 17458-59 ¶ 67 n.252; *Maine 271 Order* ¶ 33, and the Commission recently indicated that it is entirely appropriate to use those assumptions where (for example) state-specific numbers are unavailable for key traffic-related variables such as the relative percentages of interoffice and intraoffice minutes. *See New Jersey*

64/ Several parties continue to challenge Qwest's Colorado rates (for such rate elements as the loop, switching, non-recurring costs, and E-UDIT/entrance facilities), but they present no material arguments that Qwest has not already rebutted in the 02-148 proceeding. *See* Qwest 02-148 Reply Comments at 92-102; Thompson 02-148 Reply Decl. (attached to these comments as Reply Exh. JLT-1) and Exh. CO-3 thereto; *see also* Thompson Reply Decl. at ¶¶ 5-6, 91-10.

271 Order ¶ 53. Here, as in the Docket No. 02-148 proceeding, the absence of such data throughout Qwest's region more than justifies the use of standardized MOU numbers for each Qwest state. *See* Thompson Reply Decl. ¶¶ 13-14. 65/ Moreover, in the Docket No. 02-148 proceeding, Qwest already has demonstrated that it derives no systematic advantage from the region-wide use of this approach, despite AT&T's continued suggestions to the contrary. *See id.* ¶¶ 13-15.

AT&T says nothing new here to justify its proposed requirement for the use of state-specific MOU data. If anything, AT&T's arguments support exactly the opposite conclusion. AT&T now acknowledges that, throughout Qwest's region, state-specific total MOU numbers inevitably vary from year to year and that they produce sometimes higher and sometimes lower rates than the use of standardized numbers. The most straightforward, least controversial way to account for such variations is to employ the Commission's time-tested, standardized assumptions across the board for all states in the region. Requiring the use of state-specific numbers would simply incite needless controversies about how to derive average state-specific numbers from several years of recorded data and then how to modify such data using non-state-specific traffic-pattern assumptions.

2. AT&T's Alternative Benchmarking Approach is Riddled with Methodological Errors

AT&T overstates the significance of the benchmarking disputes in this proceeding. In fact, most of the purported discrepancies between Qwest's benchmarking

65/ AT&T mistakenly accuses Qwest of "withhold[ing] from the Commission and the parties data in its possession that would permit a state-specific allocation to be made." AT&T Comments, Lieberman/Pitkin Decl. ¶ 12. AT&T is wrong. Qwest has already explained that it does not have studies that support state-specific data regarding amounts of originating vs. terminating, intra-switch vs. inter-switch, and direct-routed vs. tandem-routed traffic. Thompson Reply Decl. ¶ 13 (citing Qwest Docket 02-148 reply comments at 104-105; Ex Parte Letter from David L. Sieradzki, Counsel for Qwest, to Marlene Dortch, Secretary, at 3-6 (July 22, 2002)).

analysis and AT&T's alternative analysis are attributable to several methodological errors in the latter. Correcting those errors reveals, among other things, that the use of state-specific total MOU figures, as AT&T proposes, would not lead to appreciably lower UNE rates in these four states.

AT&T's analysis mistakenly assumes that Qwest imposes the local switching usage rate twice for "intraoffice" calls – *i.e.*, for calls that both originate and terminate within the same local switch. Although other BOCs do sometimes impose two switching charges for such calls, *see, e.g., Vermont 271 Order*, 17 FCC Rcd at 7642-43 ¶ 32, Qwest imposes the charge only once. Thompson Reply Decl. ¶ 24. Under AT&T's erroneous approach, however, the number of minutes allocated to the "intraoffice" category has no effect whatsoever on what CLECs pay for *switching*, the most important category of non-loop elements; instead, the allocation is relevant only to the much less significant shared transport element. *Id.* ¶ 34. This error is ultimately responsible for, among other things, AT&T's erroneous claim (Lieberman/Pitkin Decl. ¶ 11) that "[w]hether zero percent or 100 percent of state-specific minutes are allocated to intraoffice minutes, the conclusions drawn from the benchmarking analyses based on state-specific minutes are the same – all four states fail." *See* Thompson Reply Decl. ¶ 34.

Moreover, rural states with many large, sparsely populated local calling areas served by a single switch have a much smaller proportion of interoffice traffic than densely populated states with many large, multi-switch calling areas. AT&T makes much of this fact in discussing *shared transport* costs, but then conveniently, and inconsistently, ignores its impact on the level of *switch* usage in the state. *See* Thompson Reply Decl. ¶¶ 35-36. This error, and the corresponding overstatement of the level of interoffice traffic, underlie AT&T's untenable reasons that, in rural states, where switches may serve larger geographic areas, consumers place relatively few "interoffice" calls, *i.e.*, calls that originate in one switch and terminate in another. AT&T thus concludes that the current version of the SM thus overstates transport costs in such states by assuming the same need for high-capacity interoffice transport facilities as elsewhere. AT&T Comments at 58-59 and Lieberman/Pitkin Decl. ¶¶ 18-25. This argument, too, is without merit.

As an initial matter, if AT&T's sudden attack on the SM's treatment of rural states were sound, the logical consequence would be invalidation of the SM for all purposes, including the purpose for which it was originally designed: the allocation of universal service support. This Commission has made clear, however, that a 90-day Section 271 proceeding is no place to second-guess general rules of industry-wide significance. *E.g.*, *Texas 271 Order*, 15 FCC Rcd at 18366-68 ¶¶ 23-28. Until the FCC formally revises the model, Qwest is entitled to rely on the existing model, which AT&T itself proposed in relevant part 68/ – a model that has

states." Integra Telecom makes a similar argument about Utah (*see* Comments at 5). In each case, the argument is without merit. First, the rate structures of the three states are very similar, as examination of their respective SGATs reveals. Second, as large western states with expansive mountainous and non-mountainous regions, Colorado, Montana, and Utah are at least as similar to each other geographically as are (for example) New York and Rhode Island (*see Rhode Island 271 Order*, 17 FCC Rcd 3320 ¶ 39). *See* Thompson Reply Decl. ¶¶ 7-10. In any event, as this Commission has made clear, the only necessary criterion for benchmarking between two states is "a finding of TELRIC compliance for the benchmark state," *Pennsylvania 271 Order*, 16 FCC Rcd at 17457 ¶ 64, a finding that this Commission presumably will have adopted by the time this application is decided if it grants the Colorado application in the interim. "The other criteria do not rise to such a level," and "the absence of any one of them does not render a comparison meaningless." *Id.*

68/ AT&T's new-found concerns about the SM are highly ironic, and arguably estopped, given that AT&T itself sponsored the relevant transport module in the proceedings leading up to adoption of the SM and then successfully defended the SM against legal challenge in the Tenth Circuit. *See* Fifth Report and Order, *In re Federal-State Joint Board on Universal Service, In re Forward-Looking Cost Mechanism for High Cost Support for Non-Rural LECs*, 13 FCC Rcd 21,323, 21,354 ¶ 75 (1998) ("We conclude that the federal universal service mechanism should been adopted by the Commission after a lengthy notice-and-comment rulemaking proceeding, has been upheld by the Tenth Circuit (at AT&T's urging), *see Qwest v. FCC*, 258 F.3d 1191(10th Cir. 2001), and has been used for benchmarking purposes in numerous Section 271 proceedings.

In any event, AT&T's proposed adjustments to the SM are flawed on the merits. First, any cost model is a seamless web of interconnected inputs, and AT&T altogether ignores the complex consequences of its proposed modifications for the cost model generally. Thus, if (as AT&T claims) consumers in rural areas place fewer interoffice calls than consumers elsewhere, that would be an argument not just for lowering the SM's transport costs, but also for raising the switching costs in those same areas. That is because (among other considerations) decreasing the percentage of calls involving two switches would necessarily decrease the total *number* of minutes for which Qwest recovers two (rather than one) switching charge and would thus justify a corresponding increase in the *per minute rate* necessary to cover the forward-looking cost of the switch. *See* Thompson Reply Decl. ¶¶ 16-39.

Similarly, AT&T's argument for lower transport cost figures in rural states rests on the premise that, contrary to the SM's assumptions, an efficient carrier would not deploy OC-48 fiber rings in rural states. But that premise is false, at least in Montana and Wyoming, where Qwest has efficiently deployed significant amounts of OC-48 facilities in its interoffice transport networks. In any event, if the Commission were to accept AT&T's argument on the merits, the logical consequence could well be to produce greater cost figures for other elements. This is because, to the extent that the direct investment costs for transport are reduced, a lower proportion of the costs allocated to those direct costs as "loadings" – such as network operating

incorporate, with certain modifications, the HAI 5.0 switching and interoffice facilities expenses, general support assets, and indirect costs – would be recovered through transport rates. To ensure full recovery of these costs, therefore, a correspondingly greater amount would have to be recovered through loadings on *other* network element rates. The likely result of all these corrections would be increases in some UNE rates in addition to any decreases in transport rates. *See* Thompson Reply Decl. ¶¶ 21-23.

It would be arbitrary and capricious to focus only on those assumptions that allegedly overstate, but not those that simultaneously understate, overall network costs. More generally, it would be inappropriate to reopen one factor in the SM without reexamining the model as a whole. The 90-day Section 271 process is no place for opening that Pandora's Box. AT&T's approach would introduce into that process not greater accuracy (or necessarily even lower rates), but only greater complexity and delay: objectives that would serve AT&T's interests, but only at the expense of the public interest in greater competition in the long-distance market.

AT&T's belated critique of the SM is similar to the position that it unsuccessfully advanced – both before this Commission and in the D.C. Circuit – in the New York Section 271 proceeding. There the Commission granted Bell Atlantic's Section 271 application despite AT&T's challenge to a particular switching input because, as the New York PSC had found, "[t]he web of interconnected effects [in the cost model] argues strongly against making the selective modification urged [by AT&T] without a comprehensive review of switching costs." *AT&T v. FCC*, 220 F.3d 607, 617 (D.C. Cir. 2000) (internal quotations omitted). 69/ If anything,

module.").

69/ The D.C. Circuit upheld the Commission's decision on the ground that, because "[UNE] rates may often need adjustment to reflect newly discovered information," "we cannot imagine how [section 271] applications could ever be granted" if new objections to the cost methodology

AT&T's criticisms of the SM – championed by AT&T itself, adopted by this Commission after lengthy deliberation, and upheld by the Tenth Circuit on review – warrant even less consideration in the Section 271 context than AT&T's unsuccessful criticisms of a key switching input about which the New York commission itself had expressed concerns. *See New York 271 Order*, 15 FCC Rcd at 3965 ¶ 247; *see also Massachusetts 271 Order*, 16 FCC Rcd at 9001-02 ¶ 33.

Finally, there is no merit to AT&T's related claim that the Commission has been wrong all along in analyzing switching and shared transport rates together in its benchmark analysis, rather than examining each of these rates independently. AT&T Comments at 59-60. Even if this Section 271 proceeding were an appropriate vehicle for second-guessing the Commission's long-established benchmarking analysis, which it is not (as discussed above), AT&T's argument would still be baseless on the merits.

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underlying current rates "automatically required rejection." *Id.* As the Commission has further explained:

> Congress designed section 271 to give the BOCs an important incentive to open their local markets to competition, and that incentive presupposes a realistic hope of attaining section 271 authorization. That hope would largely vanish if a BOC's opponents could effectively doom any section 271 application by freighting their comments with novel interpretive disputes and demand that authorization be denied unless each one of those disputes is resolved in the BOC's favor. Indeed, if that were the required approach, the BOCs would face enormous uncertainty about the steps they need to take to win section 271 authorization, and they would therefore lose much of their incentive to cooperate in opening their local markets to competition in the first place. That result would disserve the public interest in greater competition in both local and long-distance markets, and it would defeat the congressional intent underlying this statutory scheme.

Texas 271 Order, 15 FCC Rcd at 18367 ¶ 26; *accord AT&T v. FCC*, 220 F.3d at 631 ("We thus agree with the FCC that allowing collateral challenges [to existing Commission rules during the 90-day period] could change the nature of section 271 proceedings from an expedited process focused on an individual applicant's performance into a wide-ranging, industry-wide examination of telecommunications law and policy.").

First, there is, to Qwest's knowledge, no context in which CLECs do, or profitably could, order either switching or shared transport without ordering the other. By its nature, shared transport cannot be used except in the context of the UNE-P, in which it is combined with ILEC local switching. As the Commission recognized in the *Shared Transport Order*, "[r]equesting carriers that purchase shared transport as a network element to provide local exchange service must also take local switching, for the practical reasons set forth herein."70/ Similarly, Qwest is aware of no context in which CLECs order switching without ordering the UNE platform, which includes shared transport. In fact, the FCC ordered ILECs to offer shared transport as an unbundled element precisely because it agreed with the arguments of AT&T and other CLECs that it would be impracticable to order unbundled local switching together with either ILEC dedicated transport or CLEC-owned transport facilities. *See, e.g., Shared Transport Order* ¶ 14.

As the Commission is aware, AT&T already has challenged the joint benchmarking of switching and transport in the New Hampshire/Delaware Section 271 proceeding, which is scheduled for resolution before this one. Revealingly, in its advocacy there, as here, AT&T identifies no circumstance in which a CLEC would ever wish to order unbundled switching without shared transport. AT&T thus effectively acknowledges that this issue has no competitive significance. So long as non-loop rates as a whole satisfy the benchmark comparison, it makes no economic difference to a CLEC how those rates are formally allocated within the category of non-loop rates. This is no coincidence: it is why this Commission has

70/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration, 12 FCC Rcd 12460 ¶¶ 36, 42, 47 (1997) ("*Shared Transport Order*"), *aff'd, Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 597 (8th Cir. 1998).

always divided the UNE-P elements, for benchmarking purposes, between the loop element and all non-loop elements. *See, e.g., Rhode Island 271 Order*, 17 FCC Rcd 3320-21 ¶ 40.

Nothing in Section 271 requires the Commission to indulge the empty formalism that AT&T proposes. Here, as in other contexts, it would be both unnecessary and inappropriate "to make a distinction between cost-based rates and rates that equal cost-based rates" in actual application. *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6278-79 ¶ 87, *affirmed in relevant part, Sprint*, 274 F.3d at 561. Indeed, the only parties that would benefit from injecting such distinctions into the Section 271 process are those that, like AT&T, benefit more from obfuscation and delay than from a prompt and rational resolution of real intercarrier disputes.

In any event, AT&T's argument fails for the independent reason that the Commission's role in Section 271 proceedings is not to pin-point the "right" TELRIC rate for any given element, but simply to ensure that the rates in effect do not violate "basic TELRIC principles" or reflect "clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce." *Georgia/Louisiana 271 Order*, 17 FCC Rcd 9034 ¶ 23. AT&T has made no showing that, even viewed in isolation, the Montana and Wyoming switching rates fail that test; indeed, its arguments on this point are riddled with mistaken assumptions about how Qwest imposes switching charges and how the benchmarking analysis operates. *See* Thompson Reply Decl. ¶¶ 11-39. And, as discussed, any concerns about the switching rates in these states (even taken in isolation) pale in comparison to the controversies surrounding the switching rates in both New York and Massachusetts at the time the FCC granted Section 271 applications for those states.

Finally, it would be blatantly unfair – as well as arbitrary and capricious – for the Commission to change the benchmarking rules during the pendency of this application, as AT&T

in a given wire center are presumed to cost the same (even though some are many times longer than others), the deaveraging approach used in Montana and Wyoming permissibly focuses on distance-based cost differences. Indeed, that approach is particularly appropriate for states, such as Montana and Wyoming, with wide variations in distance from the central office but relatively few high-density areas.

AT&T nonetheless asks this Commission to force the states to use only wire-center-based deaveraging schemes, thereby focusing on population density as such rather than distance from the central office, even in states such as these with few high-density areas. AT&T Comments at 53-54 and Lieberman/Pitkin Decl. ¶¶ 7, 56.) AT&T offers no support for that position on the merits, much less for using the Section 271 process as a mechanism for challenging deaveraging techniques that, like these, are entirely consistent with all applicable FCC rules. See 47 C.F.R. § 51.507(f) ("State commissions shall establish different rates for elements in at least three defined geographic areas within the state to reflect geographic cost differences."). 72/ Again, this proceeding is an inappropriate vehicle for announcing new

72/ Indeed, the Bureau itself granted a waiver to calculate federal universal service support on the basis of distance-sensitive zones in Wyoming. *Wyoming Public Service Commission, Petition for Waiver of Targeting Requirements Found in Sections 54.309 and 54.311 of the Commission's Rules*, 16 FCC Rcd 5350 (CCB 2001). The Bureau stated:

> [W]e find that the Wyoming Commission's proposal to target non-rural high-cost support to retail and UNE cost zones [as structured in Wyoming] will result in support amounts more closely reflecting the underlying cost of providing services, which, in turn, will decrease opportunities for 'cream skimming,' and discourage uneconomic market entry. The Wyoming Commission's method of targeting non-rural high-cost support to retail and UNE cost zones furthers the Commission's goal of targeting support to the smallest practicable geographic area. Finally, we recognize that the targeting of support based on the Wyoming Commission's retail and UNE cost zones is consistent with the states' primary role of ensuring reasonable comparability of rates within their borders and would give the Wyoming Commission a degree of flexibility in reaching that goal. We, therefore, conclude that approval of the Wyoming Commission's waiver

deaveraging rules of general applicability and applying them retroactively against Qwest. *See AT&T v. FCC*, 220 F.3d at 616, 630-32; *Texas 271 Order*, 15 FCC Rcd at 18366-68 ¶¶ 23-28.

There also is no merit to AT&T's claim that these distance-based deaveraging schemes place CLECs at a disadvantage on the theory that, to determine a potential customer's zone, the CLEC must ask Qwest for that information and thereby enable Qwest to misuse its knowledge of such inquiries to target the same customers. *See* AT&T Comments at 53 and Lieberman/Pitkin Decl. ¶ 56. Qwest's IMA-GUI and IMA-EDI interfaces include an address validation tool that provides CLECs with customer addresses and associated rate zones. CLECs can discover those zones simply by accessing either of these interfaces and validating an end-user's address. Despite AT&T's unsupported allegation to the contrary, Qwest's retail marketing agents cannot obtain information about, and can gain no advantage from, a CLEC's use of IMA-GUI or IMA-EDI for these purposes. 73/

C. The Challenges to Qwest's Positive HFPL Rates are Without Merit and, in any Event, Provide No Basis for Denying this Application

Covad continues to argue, as in the Docket No. 02-148 proceeding, that any non-zero rate for line sharing violates TELRIC and is discriminatory. Covad raises no significant issues, however, that Qwest has not addressed already in its 02-148 reply comments and in its earlier submissions in this proceeding.

> petition will preserve and advance universal service, and is in the public interest.

Id. at 7 (footnotes omitted).

73/ Thompson Reply Decl. ¶ 55. Moreover, if CLECs choose not to use these or other automated information sources, they can get the same information by calling a Qwest Wholesale customer service representative. Qwest policies strictly prohibit those representatives from giving any information about CLEC inquiries to Qwest's retail marketing agents. *Id.* ¶ 56.

As an initial matter, Covad is mistaken in arguing (Comments at 13) that Qwest's positive rate for the HFPL in Washington and other states gives Qwest double recovery of loop costs. Qwest has already addressed this argument in its initial brief in support of this Application and in its Docket No. 02-148 reply brief. The short answer is that there can be no "double-recovery," because local residential rates in most states in Qwest's region do not fully recover Qwest's loop costs. *See* Thompson Reply Decl. ¶ 64.

Moreover, contrary to Covad's claim, Qwest's HFPL rates easily satisfy an "imputation" analysis. The direct costs of DSL are approximately $11.44 per line per month for the central office-based technology that is used to provide the $21.95 version of Qwest's retail DSL service and approximately $14.12 for the more sophisticated versions offered at $31.95 and up. *See* Thompson Reply Decl. ¶¶ 59-62. For imputation purposes, the retail DSL rates are appropriately compared to the sum of the service's direct costs (*i.e.*, $11.44 or $14.12, depending on the service) plus an imputed cost for the HFPL ($5.00 in Montana, $4.00 in Washington and $4.89 in Wyoming), yielding comfortable margins of approximately 42% or 76% (again, depending on the service) to cover overhead, marketing, and any other indirect costs. At the same time, the large gap between the HFPL rates and Qwest's retail DSL rates foreclose any realistic possibility of a price squeeze. *See id.*

Covad also argues (Comments at 12-13) that the loop is not a shared facility whose costs should be allocated to different services. That argument, too, is incorrect. In a line sharing configuration, two carriers are sharing use of a single network element. It is proper to view the cost of a loop in the line sharing context from the perspective of the two entities that incur the cost of the loop, which in this setting causes the loop cost to be "joint" with respect to the two entities. *See* Thompson Reply Decl. ¶ 63. 74/

Nonetheless, to alleviate residual concerns about the pricing of the HFPL, Qwest is establishing (subject to further review by the relevant state commissions) a geographically deaveraged HFPL rate in Montana, Washington, and Wyoming, the states in which the commissions have authorized Qwest to impose a positive charge. (Qwest is not taking this step in Utah, where the PSCU ordered a zero HFPL rate.) Qwest is taking this step in these states, even though it does not believe that it is methodologically necessary, to give CLECs additional flexibility in their business plans and reduce any disproportionality between an averaged HFPL rate and a geographically deaveraged loop rate. To preclude any concerns about unilateral price increases, Qwest will not increase the HFPL rate in high cost zones beyond the level of the current, averaged rate.

Finally, as Qwest has emphasized before, this controversy about HFPL rates falls squarely within the category of "disputes on issues of general application that are more appropriately the subjects of industry-wide notice-and-comment rulemaking." *Texas 271 Order*, 15 FCC Rcd at 18366 ¶ 23. In the nearly three years since the time the Commission made the HFPL a network element, it has not resolved the persistent debate about how that element should be priced, and the legal landscape recently became even less clear when the D.C. Circuit vacated

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74/ Covad quotes out of context (Comments at 12) a Qwest response to a question referring to "services." In the context of the question, "services" is meant to refer not to unbundled network elements, but rather to "retail" services such as long distance and local exchange. In that context, when a single carrier uses the loop as a non-shared network element to provide services for a single customer, that loop should not be treated as a shared facility whose costs should be allocated between services such as local exchange service and exchange access (or long-distance). The cost of a loop should not be viewed from the perspective of a user of the loop that uses the facility for multiple purposes, such as local and long distance, but rather from the perspective of the entity that incurs the cost of the loop.

the underlying obligation to make the HFPL available as a UNE in the first place. *USTA v. FCC*, 290 F.3d 415(D.C. Cir. 2002). In these circumstances, it would be improper, as a matter of both law and policy, for the Commission to deny this application by substituting its yet-unarticulated views of a proper HFPL rate for those of the Colorado or Washington commissions. *See AT&T v. FCC*, 220 F.3d at 616, 630-32; *Texas 271 Order*, 15 FCC Rcd at 18366-68 ¶¶ 23-28. 75/

VIII. QWEST SATISFIES THE SEPARATE AFFILIATE REQUIREMENTS OF SECTION 272

Section 271(d)(3)(B) provides that the Commission shall not approve a Section 271 application unless it finds that "the requested authorization *will be* carried out in accordance with the requirements of section 272." 47 U.S.C. § 272(d)(3)(B) (emphasis added). This calls for the Commission to make a "predictive judgment" 76/ about whether Qwest and its designated Section 272 affiliate, Qwest Communications Corporation, will comply with the provisions of Section 272; the nondiscrimination provisions of Section 272 do not apply until Section 271 authority has been granted and the affiliate has begun to provide in-region interLATA service. AT&T makes several arguments that, in addition to their other faults, are simply irrelevant to the question of whether, *following* QCC's entry into the interLATA market, interLATA services will be provided in compliance with Section 272.

75/ Contrary to the arguments of the Payphone Associations (Comments at 4-9), this Section 271 proceeding is no place for an inquiry into Qwest's rates for payphone access lines. That issue arises under Section 276 of the Act, not Section 251 or 252 (much less Section 271), and as such falls completely outside the scope of a Section 271 proceeding. The proper forums for resolution of such disputes are the state commissions.

76/ *Michigan 271 Order*, 12 FCC Rcd at 20715 ¶ 347 ("Section 271(d)(3)(B) requires the Commission to make a finding that the BOC applicant will comply with section 272, in essence a predictive judgment regarding the future behavior of the BOC."); *see also Second Louisiana 271 Order*, 3 FCC Rcd at 20785 ¶ 321.

All four State Commissions examined Qwest's showing exhaustively, together with AT&T's opposition thereto, and concluded that such services would be provided in compliance with Section 272. Seven other state authorities have reached the same conclusion. *See* Schwartz Reply Decl. ¶ 2. AT&T's comments rely instead almost entirely on the findings of a single administrative law judge in Minnesota — findings that have not even been adopted by the Minnesota Public Utilities Commission and are inconsistent with this Commission's precedents. In case this Commission is interested in the Minnesota proceeding, the Reply Declaration of Marie E. Schwartz includes, as exhibits, Qwest's brief in the Minnesota Section 272 proceeding, Qwest's exceptions to the ALJ's recommendations, and Qwest's "compliance filing" describing additional measures QC and QCC have implemented in an attempt to respond to the ALJ's concerns.

AT&T also mentions, in a footnote, that an ALJ with the WUTC found that QC had not demonstrated compliance with Section 272's affiliate-transaction rules and transaction-posting requirements. AT&T Comments at 122 n.477. AT&T's point is disingenuous. As the WUTC explained in its comments here, the ALJ recommended that the WUTC find Qwest out of compliance with section 272 *unless* it submit to testing by an independent third party and make certain other specific changes. WUTC Comments at 27. Qwest did make the recommended changes and submitted to the recommended testing, and on that basis, the WUTC correctly concluded that QC and QCC had satisfied the requirements of Section 272. *Id.* The WUTC correctly relied on the review by KPMG LLP to establish compliance with the exact provisions that AT&T cites, the affiliate-transaction rules and transaction-posting requirements. *See also* Schwartz Reply Decl. ¶ 4.

A. QCC Will "Operate Independently" as Required by Section 272(b)(1)

The Application establishes that QCC will operate independently from QC by showing that the two companies will not jointly own any transmission or switching facilities and will not perform operations, installation, or maintenance services ("OI&M") on each other's networks. The Declaration of Judith L. Brunsting states that QC and QCC are not currently providing OI&M services in connection with the other's switching and transmission facilities and will not do so as long as such a restriction applies. Brunsting Decl. ¶ 27(d). QCC will perform OI&M on its own network facilities. *Id.* The Reply Declaration of Judith L. Brunsting clarifies that QC and QCC have never provided OI&M services on each other's networks. Brunsting Reply Decl. ¶ 3. Neither the statute nor Commission rules prohibit joint use of facilities, provided there is no joint ownership. There is no precedent for requiring an applicant to provide an asset-deployment plan. 77/

B. QC and QCC Will Have Separate Officers, Directors, and Employees as Required by Section 272(b)(3)

The Application establishes that QC and QCC will have separate officers, directors, and employees by citing a payroll comparison, lists of officers and directors, and controls to govern sharing of services and protection of confidential information. The Biennial Audit Procedures provide that the auditor will "[i]dentify and document the types of internal controls that are in place that would prevent one from being an officer, or director, or employee of both the BOC and Section 272 affiliate at the same time" and will perform a payroll comparison. *See* Exhibit MES-272-15 at 23-24. The Declaration of Marie E. Schwartz states

77/ *See, e.g.*, Affidavit of Linda G. Yohe for Arkansas, Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194, ¶¶ 10-15.

that the payroll system used by both QC and QCC ensures that no employee may appear on both payrolls simultaneously. Schwartz Decl. ¶ 52. This is more than sufficient for Section 272 purposes. *See New York 271 Order* ¶ 409 & n.1261; *Texas 271 Order* ¶ 401 & n.1164. Whether an officer or director of QC or QCC holds a position with its common *parent* corporation is not relevant under Section 272(b)(3), which bars overlaps only between QC and QCC. This Commission has specifically rejected contentions that a BOC must provide detailed information regarding the reporting structure of such affiliates. *See Second Louisiana 271 Order*, 13 FCC Rcd at 20789-90 ¶ 330. Indeed, the provision of shared services permitted under the *Non-Accounting Safeguards Order* is subject to the requirement that "any persons provided by [QC or QCC] shall be solely the employees or agents of [the providing party] under its sole and exclusive direction and control." *See* Exhibit MES-272-9; Exhibit JLB-272-13. Nevertheless, the Reply Declaration of Marie E. Schwartz states that there are no instances of a QC employee reporting to a QCC supervisor, or vice-versa. Schwartz Reply Decl. ¶ 7.

Even though there is no requirement that employees of a BOC and its affiliate be physically separated, the Schwartz Declaration states that QC and QCC have taken reasonable steps to accomplish such a physical separation. Schwartz Decl. ¶ 55. AT&T's objection to the transfer of fewer than 200 employees between January and March 2001 is irrelevant because until the end of the transition period QCC had not yet even been designated a Section 272 affiliate. In any event, the Biennial Audit Procedures refute rather than support AT&T's claim: they demonstrate that transfers are not impermissible but will be monitored during the course of the later audit. 78/

78/ Even the Minnesota ALJ has rejected AT&T's argument that such employee transfers impermissibly add "'built-in' value" to the new employer. *See* In the Matter of a Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the

C. Transactions Between QC and QCC Will Comply with Section 272(b)(5)

The Application presents overwhelming evidence that QC and QCC will comply with the requirements of Section 272(b)(5). *See, e.g.*, Exhibit MES-272-9 (Master Services Agreement); Exhibit MES-272-11 (sample of transactions); Brunsting Decl. ¶ 43 (citing http://www.qwest.com/about/policy/docs/qcc/overview.html, which lists all posted transactions). From January through July 2002, there have been no discrepancies between the billing from QC to QCC and the work orders posted on the Internet. *See* Exhibit MES-272-12; Reply Exhibit MES-4. The results of an examination conducted by KPMG LLP show that QC and QCC have developed sufficient controls to ensure compliance with the posting requirements. *See* Exhibit MES-272-3 (report of KPMG LLP); Exhibit MES-272-4 (Jacobsen KPMG Declaration).

The Commission can easily reject AT&T's contention that the use of a services company for legal, public policy, and financial services prevents a finding that transactions are not at arm's length. AT&T Comments at 126. The Commission has explicitly permitted the sharing of services, whether provided by a BOC to its affiliate or provided by a common parent such as QSC, provided such services comply with the affiliate-transaction rules. 79/ AT&T essentially calls for exactly the kind of restriction that the Commission considered and rejected in the *Non-Accounting Safeguards Order*, when the Commission decided that no non-accounting safeguards were necessary to implement the "arm's length" requirement of Section 272(b)(5). 80/ In doing so, it rejected its original proposal to preclude the sharing of "in-house"

Telecommunications Act of 1996 (Section 272), Minnesota Pub. Utils. Comm'n, *Findings of Fact and Conclusions of Law and Recommendations*, PUC Docket No. P-421/C1-01-1372 (Mar. 14, 2002) ("Minnesota ALJ Findings"), ¶¶ 51-53, *cited in* AT&T Comments at 122 n.447.

79/ *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-93 ¶¶ 178-183; *Non-Accounting Safeguards Third Order on Reconsideration*, 14 FCC Rcd at 16313-14 ¶¶ 18-19.

80/ *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21996-97 ¶ 193.

administrative services such as "accounting, auditing, legal services, personnel recruitment and management, finance, tax, insurance, and pension services." 81/ Instead, the Commission decided that the "arm's length" requirement is fully satisfied by compliance with its affiliate-transactions rules. 82/

D. QC Will Comply with Section 272(c)'s Nondiscrimination Requirements

The Schwartz Declaration established that QC will comply with the nondiscrimination safeguards of Section 272(c). It described mechanisms that ensure that QC will not favor QCC in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards. Any IXC, including QCC, must contact its sales representative at QC in order to obtain services. If QCC desires to obtain from QC a service that has not previously been offered, that request is subject to the *additional step* of a thorough review by QC's Compliance Oversight Team. This review ensures that QC satisfies the nondiscrimination obligations of Section 272(c)(1).

AT&T persists in mischaracterizing this additional step as "a mechanism for [QCC] to request a new product, service, or information from [QC]" that is not available to competing carriers, 83/ despite the fact that Qwest has corrected AT&T on this point before this Commission and in state proceedings. Even the Minnesota ALJ found that "[t]he process, as described, does not discriminate against competing IXCs." Minnesota ALJ Findings ¶ 107; *see*

81/ *See Non-Accounting Safeguards Notice of Proposed Rulemaking*, 11 FCC Rcd at 18909 ¶ 62.

82/ *See Accounting Safeguards Order*, 11 FCC Rcd at 17593 ¶ 121 ("We conclude that our affiliate transactions rules … will ensure compliance with the 'arm's length' requirements of section 272(b)(5).").

83/ AT&T Comments at 128.

also Schwartz Reply Decl. ¶ 10. By now, AT&T must know that it is misrepresenting the facts every time it makes this argument.

AT&T argues that confidential QC information will be shared with QCC via employees of other Qwest affiliates. The training materials attached to the Schwartz and Brunsting Declarations show that all employees of Qwest companies are trained that QC's confidential information is not to be shared with QCC's employees. *See* Exhibits MES-272-18, MES-272-19, MES-272-20, MES-272-21, MES-272-23. Exhibit MES-272-19 included an e-mail, dated May 14, 2002, sent to all employees of all Qwest companies emphasizing that QC confidential information may not be shared with QCC, referring to the Code of Conduct and to the Corporate Compliance Advice Line. *See also* Schwartz Reply Decl. ¶ 9. In light of these extensive controls, AT&T's unsubstantiated arguments that there are "improper conduits of confidential information" between the BOC and the 272 affiliate are no less "unpersuasive" than those previously rejected by the Commission. *See Second Louisiana 271 Order* ¶ 345.

AT&T points to the fact that QC did not charge late-payment fees to QCC for certain past transactions that occurred during and shortly after the Section 272 transition period over a year ago. As discussed in the Schwartz Declaration, these were one-time omissions, they have been corrected, and the Master Services Agreement and Services Agreement require such payments in the future. *See* Schwartz Decl. ¶¶ 19, 48.

E. QC and QCC Will Comply with Section 272(g)'s Restrictions on Joint Marketing

The Application establishes that QC and QCC will comply with Section 272(g), and, contrary to AT&T's insinuations, the Commission has specifically acknowledged that such good-faith commitments are sufficient for this purpose. *See Second Louisiana 271 Order* ¶¶ 357-360. QCC does not currently market or sell QC's telephone exchange services and will not do so unless and until QC allows other entities offering the same or similar services to do so. Brunsting Decl. ¶ 49; Brunsting Reply Decl. ¶ 2. The Brunsting Declaration acknowledged that services such as product design, planning, and development of 272 Affiliate services are not part of joint marketing and must be offered by the BOC on a nondiscriminatory basis per Section 272(c). Brunsting Decl. ¶ 52. The Schwartz Declaration included current work orders describing the joint-marketing-planning services that QC is providing to QCC, versions of which have been available on the Internet since September 25, 2001. *See* Exhibit MES-272-17. It also confirmed that QC will comply with the equal-access requirements of Section 272(g). Schwartz Decl. ¶ 97.

IX. GRANT OF QWEST'S APPLICATION WILL PROMOTE THE OBJECTIVES OF THE ACT AND SERVE THE PUBLIC INTEREST

Consumers can expect to begin seeing significant benefits immediately upon grant of this Application. Qwest has shown that its return to the long distance market will serve the public interest by further enhancing both local and long distance competition. See Qwest Br. at 176-181; Teitzel Decl. at 31-44.

Faced with the extensive record here, competitors retreat to lower ground in attempting to fashion a countervailing public interest argument. AT&T pokes at the sufficiency of Qwest's performance assurance plans, notwithstanding that those plans are far more rigorous than those the Commission has found satisfactory in other cases. AT&T and WorldCom repeat "price squeeze" arguments that the Commission already has rejected. Beyond that, competitors simply (albeit loudly) throw up an assortment of miscellaneous arguments that they allege provide public interest reasons for denying this application.

The competitors' rhetoric is itself evidence of the strength of Qwest's showing under Section 271, and of the comprehensive work that has been done to open local markets in the application states. With little of merit to say regarding legitimate Section 271 matters, competitors seek refuge outside its bounds. However, nothing in the comments here should obscure the fundamental facts. Having fully met the Section 271 checklist and opened its local markets, Qwest's entry into the interexchange market is clearly in the public interest. These matters are discussed further below.

A. Criticisms of Qwest's Comprehensive Performance Assurance Plans Are Without Merit

No party can challenge the fundamental fact that Qwest's performance assurance plans in the application states are more rigorous than those that the Commission has deemed satisfactory in other Section 271 proceedings.

Qwest respectfully maintains that the QPAP provisions required by the WPSC are beyond the zone of reasonableness identified by the FCC. There is no support for the WPSC's contention that the "Wyoming QPAP remains flawed with elements of ambiguity and delay favoring the established incumbent." WPSC Comments at 15. To the contrary, many of the recommended provisions to which Qwest objected - an unlimited cap, sticky duration, no limit on CLEC ability to seek duplicative payments, and uncapped billing measurements - create windfall opportunities for CLECs that frustrate, rather than ensure, the development of competition.

Furthermore, Qwest disagrees with the WPSC's interpretation of certain of these provisions. For example, contrary to the WPSC's assertion, the annual cap on payment liability does not allow for "protracted lapses in conforming behavior." WPSC Comments at 11. Pursuant to Section 12.2 of the Wyoming QPAP, the cap may be addressed well before Qwest reaches the cap, *e.g.*, after two months in which Qwest has reached 1/3 of the 36% annual cap. Additionally, the WPSC's overall concern with respect to cap expansion procedures is inconsistent with the fact that the FCC repeatedly has approved "hard" annual payment caps of the same magnitude as the Wyoming QPAP and found that such absolute caps clearly fall within the zone of reasonableness.

Contrary to the WPSC's contention, nothing in the QPAP limits the WPSC's statutory authority - nor could it. The QPAP provides only that CLECs choose between standards and remedies covering the same performance. The election language in Section 13.6 of the Wyoming QPAP is exactly the same as that approved by the Colorado, Montana, Nebraska, and Washington Commissions. And although the Tier 1 payments to CLECs are treated in the nature of liquidated damages, they do not block CLECs' access to federal court, as the WPSC contends. *See* WPSC Comments at 12. Meanwhile, Section 13.6.2 of the Wyoming QPAP is the same as that approved by the Colorado, Montana, Nebraska and Washington Commissions. This provision simply sets the amount of damages for performance covered by the QPAP, unless the CLEC can show that its QPAP payments are insufficient to cover actual harm. Indeed, this provision is more generous to CLECs than the liquidated damage provisions contained in the FCC-approved Southwestern Bell plans.

The WPSC also is mistaken in its view that sticky duration is a fair and fail safe method of preventing non-conformance. Qwest's current good performance - a basis for the WPSC's insistence on sticky duration - does not mean that this provision will be either harmless or fair. Certainly, Qwest intends to continue to meet its performance measurement standards. However, any future failure to do so may well result from factors beyond its control, such as poorly drafted future PIDs, rather than a disregard for its obligations to provide non-discriminatory service. Not only does this provision have the potential to mete out punishment where no "crime" has been committed; it also fails to motivate future corrective action because it does not provide the opportunity for "rehabilitation." It also is contrary to the public interest because the permanently escalated payments operate as complete windfalls to CLECs.

Qwest strongly disagrees with the WPSC's contention that the review provisions of Qwest's proposed QPAP seek "to insulate Qwest going forward from meaningful scrutiny of the QPAP . . . ." WPSC Comments at 12. To the contrary, nothing in the QPAP precludes the Commission from engaging in a review of the QPAP. Section 16.1 states: "The Commission retains any independent authority under law to initiate a proceeding to review the QPAP at any time and to order changes to any provision of the QPAP, after notice and hearing and consistent with due process and other rights of all parties." Section 16.1.2, meanwhile, provides that any agreements adding, modifying or deleting performance measurements, as permitted by Section 16.1, between Qwest and CLECs participating in the ROC PID administration forum would be incorporated into the QPAP at such time as they are submitted to the Wyoming Commission, whether before or after a six-month review.

Finally, the WPSC contends that Qwest failed to demonstrate why the payment liability for three billing measurements should be capped in light of its ruling that there should be no limits on the escalation of Tier 1 payments. Qwest respectfully disagrees. Qwest pointed out in its response to Joint CLECs Response to Qwest Corporation's Compromise QPAP, filed with the WPSC on June 27, 2002, that the billing measurements are capped in the SBC Texas plan and its progeny. *See e.g.*, SBC-Texas plan, Appendix, "Measurements Subject to Per Occurrence Damages or Assessments with a Cap." Furthermore, in the BellSouth performance assurance plan for Georgia and Louisiana (the "SEEM"), the payment for missing a billing measurement is one dollar per month and does not escalate. *See, e.g.*, Bell South Louisiana SEEM at Table 1. By contrast, under the QPAP the per occurrence payment for a Tier 1 low billing measurement can escalate to $400.00 at six months of non-conforming performance and an additional $100.00 for each month thereafter. Qwest has provided the WPSC with monthly mock payment reports that demonstrate the potentially extraordinary liability associated with billing measurements. Under the Qwest QPAP, for all three billing measurements, the currently capped liability is *$90,000 per CLEC per month.* Qwest submits that this constitutes ample evidence to justify the continuation of monthly payment caps for billing measurements.

Qwest has incorporated language in its Wyoming QPAP that provides greater protections for CLECs than previously has been required by the Commission. The record fully demonstrates that Qwest's Wyoming QPAP meets all of the Commission's criteria and is a sufficient anti-backsliding mechanism to support Qwest's Wyoming application.

CLEC comments are notably silent on PAP issues. Covad, Eschelon and AT&T argue for a few additional PIDs with PAP payments. 84/ The CLECs' request for inclusion of a

84/ OneEighty's comments do not implicate the sufficiency of the Qwest PAPs. As discussed above at Section VI.D and in the Bumgarner Reply Declaration at 11-15 the June outages alleged by OneEighty were the result of Neustar's (the NANPA) erroneous cancellation and reassignment of NPA/NXX code and was not Qwest's error. *Id.*

Qwest's PAP includes performance measurements that measure and produce Tier 1 payments to CLECs for out-of-service incidents. (Qwest notes that the facts alleged by OneEighty related to the June outages may not warrant liability under the PAP, even under these measurements.) MR-3, Out of Service Cleared within 24 Hours, applies to non-design services and MR-5, Out of Service Cleared within 4 Hours, applies to design services. The PAP includes a measurement that evaluates the timeliness of Qwest's NXX code activation prior to the LERG effective date or by a "revised" effective date. *See* Table 1, "NP-1, NXX Code Activation." However, this measurement would not apply to OneEighty's claims as they are related to cancellation and reassignment of existing codes, rather than the activation of new NPA/NXX codes assigned to a CLEC's customers. And the PAP is structured to provide significant payments to CLECs under these measurements. Under a per-occurrence payment structure, the PAP pays on the percentage of trouble reports that did not meet the standard, relative to the total number of trouble reports in the same reporting period. The number of non-conforming trouble reports is then multiplied by the applicable payment amount identified in the PAP. *See* QPAP § 4.3. The amount may be the base amount or a higher amount depending upon whether other facets of the plan, such as payment escalation, also apply.

service order accuracy PID should be moot in light of Qwest's request that the State Authorities include PO-20 in the PAPs in their respective states. 85/ Any interest in including additional PIDs should be raised in the six-month reviews.

AT&T's claim that Qwest's data are inaccurate and, therefore, cannot be relied on to determine the sufficiency of the PAPs (Comments at 144) is completely without merit. The accuracy of Qwest's data has been verified through the Liberty audit and resulting reports and the data reconciliation efforts conducted through the ROC OSS collaborative. 86/ Each PAP also provides the opportunity for ongoing audits of performance measurements. Moreover, the sufficiency of the plans has been demonstrated through months of workshops and hearings in which the structure of the plans was fully scrutinized quite apart from the data that would pass through them. Finally, AT&T never asserted during the extensive state proceedings that any alleged inaccuracies in the data inputs prevented the plans from being properly evaluated.

Finally, nothing in the Montana or Washington PAPs is inconsistent with FCC expectations or with other plans that previously have been approved by the FCC. Contrary to AT&T's claim, nothing in either of those PAPs impedes the ability of the MPSC or WUTC to enforce and supervise the PAP. Indeed, AT&T's complaints appear to center around its unfounded belief that, in order for its performance assurance plan to pass FCC muster, an RBOC must go so far as to grant substantive authority to a state commission, or waive its rights to due

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85/ Pursuant to its *ex parte* submissions dated August 9, 2002 and August 19, 2002, Qwest made a request to each of the nine states for which Qwest had Section 271 applications pending asking that the State Authorities accept PO-20 and associated proposed payments in the state's PAP.

86/ *See* Liberty Audit Report, Appendix, D, Tab 4-16; The Liberty Consulting Group Report on Data Reconciliation of Qwest's Performance Measures, April, 2002, Appendix D, Tab 18-24. The data reconciliation process was discussed in detail in the Application; additional information is provided in the Williams Reply Declaration and above at Section III.

process or to contest future commission orders. Nothing in any FCC approved PAP or any FCC order requires such a concession from an RBOC.

B. The Commenters' "Price Squeeze" Arguments are Both Legally Untenable and Factually Unsupportable

WorldCom asserts a price squeeze in all four application states, though it concedes that positive margins are available throughout Washington, as well as in the density zones representing the majority of residential end users in Utah and Wyoming. AT&T asserts that a price squeeze exists in Montana and Washington, 87/ but concedes that positive margins are available to CLECs throughout both of those states. AT&T's and WorldCom's price squeeze claims must be rejected. 88/

87/ AT&T's reference to Wyoming (AT&T Comments at 96) appears to be in error; AT&T presents no price squeeze evidence for Wyoming. AT&T also alleges a possible *future* price squeeze in Utah, given rate levels proposed in a pending proceeding before the PSCU. AT&T Comments, Lieberman/Pitkin Decl. ¶ 55 But the fact that UNE rates *may* be revised at some unknown point in the future stands as no bar to a Section 271 application. Indeed, the Commission routinely has approved applications even when the applicant's rates were the subject of an ongoing or imminent state TELRIC proceeding, or even ongoing federal litigation, at the time of approval. *See, e.g., Georgia/Louisiana 271 Order* 17 FCC Rcd at 9067-68 ¶ 98 (rejecting CLECs' argument that applicant's proposal to increase some UNE rates in pending state proceeding required denial of Section 271 application); *Massachusetts 271 Order*, 16 FCC Rcd at 9006 ¶ 37 (approving application where loop rates were subject to ongoing federal court challenge); *Rhode Island 271 Order*, 17 FCC Rcd at 3323-24 ¶ 46 ("The Commission previously has held that the existence of a new cost proceeding is insufficient reason to find that a state's existing rates do not satisfy TELRIC principle. . . . As the Court of Appeals for the D.C. Circuit has recognized, rates require continual adjustment to reflect changing information, and section 271 applications would never be granted if such adjustment required denial.").

88/ OneEighty and Integra Telecom of Washington, Inc. also half-heartedly suggest that UNE rates in Montana and Washington, respectively, preclude competition. *See* OneEighty Comments at 4-5 & Attachment 1; Comments of Integra Telecom of Utah, Inc., and Integra Telecom of Washington, Inc. at 9-10 & Attachment 1. Neither, however, sets forth the kind of detailed margin analysis demanded by this Commission's prior orders. For example, neither of these parties even purports to present any analysis of access, toll, and feature-related revenues available to a CLEC serving end users in the relevant state, or to set forth the efficient costs that would be encountered by an efficient carrier offering service in either state. Nor did either

The CLECs' price squeeze claims are indistinguishable from those that the Commission repeatedly has held pose no barrier to approval of a carrier's Section 271 application. In particular, the Commission has recognized that in rural areas, a tight margin between UNE rates and available revenues might be "the result of subsidized local residential rates in one or more zones and not the fact that UNE rates are not at an appropriate point in the TELRIC range." It thus would not "be in the public interest to deny a section 271 application simply because the local telephone rates are low." *Vermont 271 Order*, 17 FCC Rcd at 7663 ¶ 68; *see also Georgia/Louisiana 271 Order*, 17 FCC Rcd 9181-82 ¶¶ 286-87. In such circumstances, resale "provides a profit margin" even where "the costs of individual elements *exceed* the retail rate." *See Vermont 271 Order*, 17 FCC Rcd at 7664 ¶ 69 (emphasis added). No party here has made any attempt to demonstrate that the margins about which they complain are due to factors other than state subsidization of basic service.

Contrary to AT&T's suggestion, *Sprint v. FCC*, 274 F.3d 549 (D.C. Cir. 2000), does not preclude the Commission from applying the foregoing principles. Indeed, the *Sprint* court expressly noted that tight margins might result from artificially low retail rates, and simply required the FCC to clarify its reasoning and to "help establish the reasonable range for interpretations of the statutory criterion." 274 F.3d at 555. The Commission has done just that. 89/

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present any evidence of a price squeeze to the State Authorities. Their claims must therefore be rejected.

89/ The Court of Appeals invited the Commission to assess whether the principles of *FPC v. Conway*, 426 U.S. 271 (1976), are applicable in this unique statutory context. The Commission did so, and determined that those principles are not applicable, for a number of reasons. *Vermont 271 Order*, 17 FCC Rcd at 7664 ¶ 67. This conclusion is fully consistent with *Sprint*, which as noted above recognized the Commission's important role in interpreting the scope of the public interest standard of the Act.

In any event, the CLECs' newly prepared margin analyses in fact demonstrate no "squeeze" at all. As a procedural matter, because AT&T and WorldCom failed to present their new margin analyses to any state commission within Qwest's region, these analyses should not be considered. *See* Thompson Reply Decl. ¶¶ 68, 70, 73-74. As the Commission previously has stated, it is essential that parties to Section 271 proceedings first present all of their data and arguments to state commissions, given that "it is both impracticable and inappropriate for [the FCC] to make many [kinds of] fact-specific findings [in the context of a] section 271 review." *Vermont 271 Order*, 17 FCC Rcd at 7636 ¶ 20. As a result of such "sandbagging," neither Qwest nor the state commissions have had any opportunity to review and scrutinize AT&T's or WorldCom's new margin analysis as a whole or any of its components. Thus, for example, no party has had an opportunity to conduct discovery and cross examination relevant to AT&T's remarkable assertion that an "efficient" carrier would incur $10 per line per month in non-network (*e.g.*, marketing) costs to provide local service. Because AT&T's analysis has not been subject to any prior scrutiny, much less the kind of scrutiny given to Qwest's cost studies, it should be given little if any weight. Any other result would lead to findings based on unreliable data, and encourage similar sandbagging in the future.

Even if considered, the new margin analyses fail to demonstrate a price squeeze. First, neither AT&T nor WorldCom presents sufficient analysis on which the Commission could base a finding of a price squeeze in any of the application states. WorldCom offers no support whatsoever for any of the figures presented in its table. AT&T's analysis is little better. For example, AT&T cites revenue "data taken from the TNS Telecoms Bill Harvest market research product updated through the first quarter of 2002," (AT&T Comments, Lieberman Decl. ¶ 45) but neither that analysis nor the underlying data are included with AT&T's filing or otherwise available to Qwest.

Second, AT&T and WorldCom have misstated the relevant revenues available to competitors in the applicable markets. It appears, for example, that AT&T has failed to account sufficiently for the FCC's holding that price squeeze analyses must take account of access revenues. *See Vermont 271 Order*, 17 FCC Rcd at 7664 ¶ 71. Compared to WorldCom's analysis, AT&T's analysis understates access revenue by more than half. *See* Thompson Reply Decl. ¶ 75. But WorldCom fares no better. It uses inaccurate retail rates for more rural zones in Montana and Wyoming that grossly understate available revenues in those zones. *See id.* ¶¶ 75-76. Further, WorldCom assumes, with no supporting analysis, that the average end user likely to be targeted by a CLEC will order only *one* vertical feature. *See id.* ¶ 74. In deed, WorldCom's unsupported assumption is contradicted by the fact that its flagship local product, "The Neighborhood" - already available in Washington and Utah, as well as 32 other states and the District of Columbia 90/ - includes a bundled package of *four* or *five* features. 91/ In fact, WorldCom's website offers no other local service package to new subscribers. *See* http://www.mci.com. The result of the CLECs' unsubstantiated, scattershot revenue assumptions is unsurprising: their own figures differ substantially. *See* Thompson Reply Decl. ¶ 75.

Third, AT&T and WorldCom fail to substantiate their claims regarding the UNE rates they will pay to Qwest. For example, they include various non-recurring charges that

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90/ http://www.theneighborhood.com.

91/ *See Ex Parte* Letter from Lori E. Wright, WorldCom, to Marlene Dortch, Secretary, Federal Communications Commission (Aug. 15, 2002). Other sources suggest that the Neighborhood package in fact includes six features. *See* Chittum, Ryan, "Phone Service on the Cheap," *The Wall Street Journal*, July 2, 2002, at D1. WorldCom plans to have over two million Neighborhood subscribers by the end of 2002. *See id.* at D3.

should not be included in the margin analysis. When AT&T initiates service for a new customer not already connected to another LEC, it will of course incur non-recurring costs, just as Qwest does when *it* establishes service for a new retail end user, but it can recover such costs from the end user - again, just as Qwest does itself. If AT&T wishes to include the non-recurring charges associated with establishing service for a new customer among its UNE costs, it must include corresponding installation fees among its revenues. Indeed, AT&T's tariffs demonstrate that it *does* apply installation fees. For example, a Washington end user seeking to connect a new or additional line will pay a $30.00 service ordering charge plus a $30.00 per-line activation charge. 92/ Such fees do not put AT&T at any sort of competitive disadvantage, because Qwest applies comparable fees as well. 93/ Even allowing for these charges, and for no corresponding revenue collection opportunities, AT&T concedes a positive margin in each zone in both states. 94/

Fourth, AT&T and WorldCom's analyses turn on estimates of "internal costs" that have not been subject to any regulatory scrutiny, much less endorsed by any regulator, and that have been rejected repeatedly by the Commission. In its recent orders, the FCC repeatedly has rejected AT&T's and WorldCom's remarkable claims that they experience internal costs of

92/ *See* AT&T Broadband Phone of Washington, LLC, Telecommunications Services Price List, section 4, at 2 (effective August 5, 2002).

93/ In contrast, when AT&T signs up an end user who wishes to be migrated from Qwest or another LEC, the non-recurring charges applied by Qwest will be miniscule - for example, about 68 cents in Washington and 69 cents in Montana. Amortized over thirty months, and including non-recurring OSS charges where those apply, the monthly charge is less than fourteen cents in Washington and less than three cents in Montana. *See* Thompson Reply Decl. ¶¶ 79-81.

94/ The CLECs also include DUF charges in their analyses. While such charges involve relatively minor amounts, they are incurred by Qwest for purposes of enabling CLECs to bill their own customers. There is no explanation by the CLECs why they are therefore not already factored into their purported customer care costs. *See* Thompson Reply Decl. ¶ 78.

$10.00 or more, on the basis that this figure did not represent an *efficient* carrier's costs. *See Vermont 271 Order*, 17 FCC Rcd at 7664, ¶ 70; *New Jersey 271 Order* ¶ 172; *Georgia/Louisiana 271 Order*, 17 FCC Rcd 9182, ¶ 288. WorldCom does not even attempt to respond to these holdings, but rather relies on the *very same affidavit* the Commission previously has repudiated. *See* WorldCom Comments at 34 n.17; *Vermont 271 Order*, 17 FCC Rcd at 7664, ¶ 70.

AT&T purports to respond to the Commission's prior orders, claiming that its analysis "is based on the internal costs of an efficient entrant." AT&T Comments, Lieberman Decl. ¶ 32. Apart from the fact that these representations have not been tested, AT&T's assumed per-line internal costs are actually *higher* than those the Commission rejected in its previous orders. *See* Thompson Reply Decl. ¶¶ 89-90. AT&T's figures, moreover, are based entirely on a string of unsubstantiated "costs" and undocumented "factors" by which those costs were allegedly adjusted to simulate the expenses of an efficient carrier. *See id.* The fact that AT&T now breaks its "internal costs" into various components does not, in the absence of any supporting evidence, render them any more reliable than the previously unsubstantiated assertions by WorldCom that the Commission has previously rejected, particularly since they are significantly more than the costs that the State Authorities estimated in computing the "avoided cost" resale discount. *See* Thompson Reply Decl. ¶¶ 86-92.

AT&T's contention that its purported internal costs exceed the difference between *resale* rates and available revenues has not been subject to any evidentiary scrutiny by any regulator. More likely, AT&T's estimated internal costs are overstated, as suggested by the substantial evidence concerning CLEC use of resale in each of the four application states. *See*

Thompson Reply Decl. ¶ 98-101. Moreover, in its *Vermont 271 Order* the Commission rejected CLEC claims that the availability of resale is irrelevant to the "price squeeze" allegations:

> AT&T and WorldCom contend that it is inappropriate to consider the availability of resale as a competitive option because the margin is insufficient. We disagree. The distinction between how UNEs and resale are priced is significant here. UNEs are priced from the "bottom up," that is[,] beginning with a BOC's costs plus a reasonable profit, whereas resale is priced from the "top down," that is, beginning with a BOC's retail rate and deducting avoided costs. Such differing price structures are evidence that Congress envisioned competitors entering the market through different entry mechanisms under different circumstances.

Vermont 271 Order, 17 FCC Rcd at 7664, ¶ 69. Thus, Section 271 does not require that a CLEC be able to serve customers at a profit in every density zone in order for this Commission to approve a long-distance application, and certainly does not require that a CLEC earn a profit in areas where even the ILEC itself cannot do so. 95/

95/ Indeed, the Commission has expressly rejected the idea that resale discount rates must be set at a level that ensures the viability of a reseller's business. *See Local Competition Order* ¶ 914. Section 271, of course, links a grant of long-distance authority to the existence of forward-looking cost-based UNE rates consistent with Section 252(d)(1) (checklist item 2), and resale discounts consistent with Section 252(d)(3) (checklist item 14). The checklist does *not* require any particular relationship between the two. AT&T may not use the public interest inquiry to rewrite the requirements of Section 271 or Section 252 by impermissibly linking resale margins to its purported costs. *See Maine 271 Order* ¶ 57.

The Commission also has rejected the notion that Qwest's access rates could subject unaffiliated interexchange carriers to a price squeeze, as suggested by the MPSC (Comments at 5-6, 9-10). Accordingly, there is no basis for the MPSC's view that Qwest's satisfaction of the public interest standard under Section 271 requires it to file a revenue requirement/rate design case by October 1, 2002. *See* Qwest Br. at 191-92. *See also* MPSC Comments, Separate Statement of Commissioner Bob Rowe, at 2-3 (observing that, because "[t]here is no . . . nexus between intrastate long distance rates and any specific element of Section 271," the MPSC's proposed condition is a "full leap away from Section 271" and therefore "should be addressed by the [MPSC] under its own authority.").

C. There Are No Extraordinary Circumstances Warranting Denial or Deferral of Qwest's Application

Finally, and predictably, some commenters argue that the Commission "must, under [the] public interest standard, consider a variety of other factors as evidence that the local market is not yet truly open to competition, despite checklist compliance." *New Jersey 271 Order* ¶168. The Commission has rejected such efforts to expand the requirements of the Act in the past, and it should do so again here.

For instance, a few commenters claim that there is too little residential competition in some of the application states. *See* Sprint Comments at 10-11; AT&T Comments at 147-150. However, as the Commission repeatedly has held, "[g]iven an affirmative showing that the competitive checklist has been satisfied, low customer volumes or the failure of any number of companies to enter the market in and of themselves do not undermine that showing." *Pennsylvania 271 Order*, 16 FCC Rcd at 17487 ¶ 126. The Commission likewise has concluded that it will not adopt or apply a market share or other similar test for BOC entry into long distance. 96/ The Commission has made clear that these determinations apply to the public interest analysis as well as the Track A issue. *See New Jersey 271 Order* ¶168 & n.516 (rejecting attempts to insert market share or geographic penetration requirements into the public interest analysis). This confirms what the Commission has determined is "Congress' desire to condition approval *solely* on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity to enter the market." *New York 271 Order* ¶ 427.

96/ *See, e.g.*, *New Jersey 271 Order* at 168; *Maine 271 Order* ¶ 59; *Georgia/Louisiana 271 Order* ¶ 282; *Vermont 271 Order* ¶ 63; *Rhode Island 271 Order* ¶ 104; *Arkansas/Missouri 271 Order* ¶ 126; *Pennsylvania 271 Order* ¶ 126; *New York 271 Order*, 15 FCC Rcd at 4163 ¶ 427; *Massachusetts 271 Order*, 16 FCC Rcd at 9118-19 ¶ 235; *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6375-76 ¶ 268; *Texas 271 Order*, 15 FCC Rcd at 18558-59 ¶ 419.

Several commenters have alleged anticompetitive behavior by Qwest. *See, e.g.*, AT&T Comments at 133-147; Touch America Comments at 29. But these purported anti-competitive acts amount to nothing more than a laundry list of unadjudicated and contested *assertions* from litigation filings in pending, unrelated dockets. *See, e.g.*, allegations that Qwest's arrangements with Touch America amount to the provision of in-region interLATA services (Touch America Comments at 24; AT&T Comments at 141-143); 97/ allegations having

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97/ Qwest is in the midst of a commercial dispute with Touch America over amounts due to Qwest in excess of $125 million. In that environment, Touch America has filed two meritless complaints against Qwest with the Commission, one alleging that the sale of IRUs in cable facilities violates Section 271, and the second claiming that other alleged grievances it has with Qwest related to its purchase of Qwest's in-region long distance business in 2000 constitute violations of Section 271 and the order approving the Qwest-U S WEST merger. See File Nos. EB-02-MD-003 and –004.

The disputes between Touch America and Qwest will be addressed in the pending commercial arbitration and litigation between the parties, and the FCC will dispose of the associated complaints as well in due course. For present purposes, it is enough to say that Qwest strongly objects to the Touch America allegations, which misleadingly disregard both the facts and the law. Two examples should suffice for that purpose here. Touch America complains about Qwest's sale of IRUs notwithstanding that Qwest expressly stated its intention to sell IRUs post-merger, and the Commission approved the merger with that information before it. See Qwest Divestiture Compliance Report, *Qwest Communications International Inc. and U S WEST, Inc.*, CC Docket No. 99-272, at 28-30 (filed April 14, 2000)(stating that Qwest would not unwind any pre-existing sales of in-region, interLATA IRUs "both for the conveyance of dark fiber and for the conveyance of lit fiber capacity" and that "it intend[ed] to continue selling similar telecommunications facilities in the future.") Similarly, Touch America has alleged that Qwest is not providing satisfactory OSS, referencing its complaints with various databases and software systems. *Touch America Comments* at 11-12). Yet the "Qwest" systems Touch America references belong to Qwest Communication Corporation, are not used by Qwest Corporation, and are completely irrelevant to this proceeding.

The Commission has determined that complaints pending before the Commission in other dockets should not be litigated in a Section 271 docket. The Commission also has made clear that disputes arising from BOC merger orders that are currently being considered in its complaint dockets are best resolved in those other pending dockets, not imported into the consideration of Section 271 applications. *Georgia/Louisiana 271 Order* ¶ 207-08 (citing *Kansas/Oklahoma 271 Order* ¶ 19); *Connecticut 271 Order* ¶ 79. Qwest will continue to defend itself against Touch America's allegations in the appropriate forums. Meanwhile, Touch America's unfounded and disingenuous allegations provide no basis for denial of this Application.

nothing to do with the local exchange market, such as claims regarding Qwest's rates for pay telephone access lines and fraud protection (Payphone Associations Comments at 3-8); one-shot disputes that have long been settled or otherwise addressed, such as long-ago resolved allegations regarding AT&T's access to NIDs in multiple dwelling units in Washington (AT&T Comments at 137); or incidents occurring *outside* Montana, Utah, Washington and Wyoming that have no connection to Qwest's operations in those states, such as a systems testing dispute between Qwest and AT&T in Minnesota. AT&T Comments at 136-138.

While the Commission has stated that it is "interested" in evidence of BOC misconduct, *Michigan 271 Order* ¶ 397, it has made equally clear that it is not enough simply to paint a BOC as an inherently bad actor; rather, such evidence is relevant only insofar as it establishes a "pattern" that "would tend to undermine [the Commission's] confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority." For that reason, "allegations [that] do not relate to the openness of the local telecommunications markets to competition" present no reason to "deny or delay [an] application under the public interest standard." *New Jersey 271 Order* ¶ 190. Likewise, incidents of past misconduct that have been *resolved* going forward (whether in the Section 271 process or in separate enforcement proceedings) do not call into question whether the market now "is, or will remain, open to competition." *Michigan 271 Order* ¶ 397. In addition, the Commission has repeatedly confirmed that a Section 271 proceeding is not the place to consider inter-carrier disputes that are pending (or more properly belong) in separate complaint or enforcement dockets. 98/

98/ *See, e.g.*, *Georgia/Louisiana 271 Order* ¶ 305; *Pennsylvania 271 Order* ¶¶ 108, 118; *Massachusetts 271 Order* ¶ 203; *Kansas/Oklahoma 271 Order* ¶ 230, *Texas 271 Order* ¶ 383.

X. THE SO-CALLED "UNFILED AGREEMENTS" DISPUTE PROVIDES NO BASIS WHATSOEVER FOR DELAYING ACTION ON THIS APPLICATION

A. For all of AT&T's Rhetoric, the Actual Record Shows No Broad Pattern of Discrimination in Favor of Certain CLECs.

AT&T, in its comments (at 17-30, 134-36) and in an *ex parte* letter dated August 16, 2002, 99/ argues that the so-called "unfiled" or "secret" agreements issue provides a basis for the Commission to ignore the overwhelming evidence in this record of Qwest's efforts to open its local markets. AT&T contends that the Commission should deny Qwest the right to provide competing interLATA services for an indefinite period. Touch America echoes AT&T's view, *see* Touch America Comments at 28-29, but for the most part AT&T has taken the lead in trying to promote "unfiled agreements" as a basis for unfavorable action.

Unfortunately, AT&T's pleadings to the Commission on this issue are misleading and unhelpful to a fair review. AT&T tries to paint a picture of broad scale "secret deals" and "unreasonable discrimination." Yet AT&T is misstating the record in state proceedings dealing with this issue, including both State Authority reviews of Qwest-CLEC contracts, and KPMG's findings in connection with the OSS test. Put simply, AT&T is trying to distort a small compliance question involving an undeveloped legal area, and exaggerating its significance beyond recognition. However, AT&T cannot show that this issue outweighs the voluminous evidence here that Qwest's local markets are open. And this is all the more true given Qwest's actions to file the contested contracts without reference to whether such filings are mandatory under the Act.

99/ *See* Letter from Mark D. Schneider to Marlene H. Dortch, August 16, 2002 ("AT&T August 16 *Ex Parte*"), at 3.

Significantly, AT&T already has tried to shop this same argument to State Authorities throughout the Qwest region - the parties that are closest to the Section 252 filing process. To date all ten of the State Authorities that have considered AT&T's position have rejected it, including the Authorities in all of the application states in Docket Nos. 02-148 and 02-189. The Department of Justice also has twice recommended that this issue not be considered grounds for denying Qwest's applications. The FCC should reach the same conclusion here.

1. The Forest and the Trees: Restoring the Larger Context AT&T Carefully Omits

In order for the Commission to evaluate AT&T's argument, the so-called "unfiled agreements" issue must be put in context, both as a stand-alone matter, and as a potential factor in a Section 271 analysis. At a most basic level, AT&T is asking the Commission to ignore the forest and instead stare myopically at a few trees.

First, AT&T disregards the undisputed fact that Qwest has filed hundreds of interconnection agreements. The record here establishes that Qwest is offering interconnection broadly, and that it is willing to negotiate and reach agreement with CLECs to meet their specific needs. The record also demonstrates that Qwest routinely meets its filing obligations under Section 252(a). 100/

Second, AT&T disregards the undisputed fact that many ILEC-CLEC contracts need not be filed and approved under Section 252(a). For example, AT&T cites as if it were authority conclusory allegations of the Minnesota Department of Commerce ("MDOC"), a strong opponent of Section 271 authority for Qwest. 101/ Yet even the MDOC, which reviewed

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100/ Copies of Qwest's interconnection agreements are provided in this record at Appendix L.

101/ Typical of AT&T's distortion of the facts, it quotes from the MDOC, *see* AT&T August 16 *Ex Parte* Letter at 6-7, without reference to the fact that Qwest has rebutted the MDOC's misreading of the agreements with actual testimony in hearings before the Minnesota over 75 "unfiled" agreements between Qwest and CLECs, ended up alleging that only 11 of them should have been filed in its complaint to the Minnesota Commission. 102/ Qwest is vigorously contesting these allegations with testimony from witnesses who know the actual circumstances surrounding these contracts. But meanwhile a larger - and undisputed - point is most relevant here: This issue involves only a limited number of contracts between Qwest and CLECs. No party disagrees that in the vast majority of cases Qwest either (1) filed a contract with a CLEC as an interconnection agreement, or (2) had no obligation to do so.

Third, AT&T disregards the fact that, as a simple legal matter, the scope of the mandatory filing obligation under Section 252(a) has never been defined. A serious legal question arises as to how much of the CLEC-ILEC business relationship falls within the regulatory purview of State Authorities through the filing and 90-day approval process. Does Section 252 apply to contracts establishing the specifics of how an ILEC and CLEC meet together, manage their relationship, and resolve disputes? Does Section 252 apply to contracts containing specific implementation details for arrangements whose general parameters already are contained in filed interconnection agreements? Does Section 252 apply to contracts that settle past disputes? For that matter, does Section 252 require filing of contracts that do not relate to Section 251 matters at all, based on the circumstance that the parties have other

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Commission. For that matter, AT&T does not advise the FCC that the MDOC is strongly opposing Qwest across the entire panoply of Section 271 issues in the proceedings in progress before the Minnesota Commission. The MDOC is hardly an impartial party there, and it is therefore disingenuous for AT&T to rely on the MDOC's allegations as "authority" in this proceeding.

102/ The MDOC subsequently has alleged the existence of an unfiled oral agreement that should have been filed. AT&T repeats that allegation. AT&T August 16 *Ex Parte* at 9. Qwest does not concede that it entered into such a binding legal agreement, and has presented evidence to that effect before the Minnesota Commission.

contracts that do? These are generally the kind of "unfiled" contracts at issue here, not standard interconnection agreements.

Because of the lack of clarity on the legal standard, Qwest has filed a Petition for Declaratory Ruling asking this Commission to define once and for all the scope of ILEC-CLEC agreements subject to Section 252(a)(1)'s filing requirements. 103/ The FCC Petition sets forth Qwest's understanding of the statute and its legislative history and purpose. The Commission has received and reviewed a great many comments on the issue and will issue a ruling that provides ILECs and CLECs guidance on this important question. But meanwhile, legal uncertainty remains.

Fourth, AT&T disregards the fact that when this issue arose in the context of the MDOC complaint, Qwest immediately took action to facilitate regulatory review. In Minnesota it arranged to have the affected CLECs waive confidentiality provisions of the alleged "unfiled agreements" so that they could be made public. Qwest requested expedited review and asked the Minnesota Commission to accept any of the contracts under Section 252 insofar as it agreed with the MDOC that they were subject to filing requirements. Qwest also sent letters to other states in its region, notified them of the issue, and provided a copy of its answer to the MDOC complaint, as well as copies of contracts cited by the MDOC that also were relevant to the state. Since then, Qwest has fully cooperated with states that have requested more information on this subject. 104/

103/ *See* Petition for Declaratory Ruling of Qwest Communications International Inc., *In the Matter of Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, WC Docket 02-89, filed Apr. 23, 2002 (the "FCC Petition").

104/ Examples of these letters have been provided to the Commission in Docket No. 02-148 and are incorporated herein by reference.

Fifth, AT&T disregards that "unfiled agreements" allegations involve questions of fact as well as law, fact questions that the Commission cannot simply presume eventually would be resolved against Qwest in an enforcement proceeding. Even assuming the existence of an agreed upon legal standard, Section 252(a) still requires fact-based review of each CLEC contract, both with respect to the meaning of its terms, and with respect to its context and relevance for other CLECs. AT&T is flatly misreading provisions of certain alleged "unfiled agreements" in order to fit them into its own interpretation of Section 252(a), misreadings that Qwest has rebutted with testimony in Minnesota from persons who actually know what the contracts are about. Qwest has not introduced the record of that proceeding here, both because Minnesota matters are not directly at issue, and because the fact questions involved are precisely the kind of enforcement matters that should not be taken up in a Section 271 proceeding. Nevertheless, Qwest must make reference to that proceeding in order to respond to AT&T's bare allegations here. 105/ They provide examples of why factual context is relevant to a determination of whether an ILEC-CLEC contract actually must be filed under Section 252(a) - whatever the applicable legal standard.

- The MDOC has complained about an agreement related to intraLATA access charges imposed by a CLEC on Qwest, which is not a matter relevant to Qwest's own Section 251 obligations. Qwest Post-Hearing Memorandum at 49.

- Qwest has shown that reciprocal compensation arrangements in so-called unfiled agreements did not have to be filed at the time because the FCC had deemed them interstate, and/or the same arrangements were on file in approved interconnection agreements. *Id.* at 33-35.

105/ Qwest will be referencing its Post-Hearing Memorandum in proceedings before the Office of Administrative Hearings of the Minnesota Public Utility Commission in MPUC Docket No. P-421/C-02-197 (filed Aug. 23, 2002) ("Qwest Post-Hearing Memorandum"). Qwest will make a copy of the filing, which in turns references the evidentiary record developed in the hearing, available to the Commission on request.

Qwest is not asking the Commission to evaluate these fact questions for itself. Our point only is that, in order to determine whether a particular contract must be filed under Section 252, such facts and context are important issues. AT&T is presenting its allegations regarding these matters. But the record here does not permit the Commission to reach any conclusions - nor should it. These compliance matters are not questions appropriate to a Section 271 analysis.

Sixth, and related, AT&T simply assumes that if an agreement should have been filed but was not, the result is serious, market-impacting discrimination. But that too is a gross exaggeration, involving fact questions that are not susceptible to an automatic assumption. For example, the MDOC has challenged contracts that were in place only for a short time and then terminated or superseded. Qwest also has presented unrefuted evidence demonstrating that contracts singled out by the MDOC did not give preferential treatment even if filing was required. For example,

- Leaving aside the fact that the Eschelon on-site assistance cited by AT&T (AT&T August 16 *Ex Parte* Letter at 11 n.37) was disclosed in a filed interconnection agreement, Qwest provided unrebutted evidence in Minnesota that its off-site wholesale service managers provide identical customer assistance functions to all CLECs. Qwest Post-Hearing Memorandum at 39; *see also id.* at 50-52.

- AT&T complains of a contract spelling out dispute resolution processes, including escalation processes. AT&T August 16 *Ex Parte* Letter at 11 n.37. But Qwest provided evidence in Minnesota that this contract merely memorialized substantially the same procedures used by all CLECs. Qwest Post-Hearing Memorandum at 40-42.

- AT&T complains that Qwest agreed to regular meetings with a CLEC. AT&T August 16 *Ex Parte* Letter at 11 n.37. But Qwest demonstrated in Minnesota that it meets regularly with its CLEC customers, and no evidence was presented that Qwest had refused to meet. Qwest Post-Hearing Memorandum at 42-43.

- To the extent that AT&T complains that about credits paid to a CLEC to settle a DUF dispute, it ignores the fact that the dispute related to a specific service that AT&T was not even taking, leaving aside the issue of whether a settlement agreement is a proper subject of Section 252. Qwest Post-Hearing Memorandum at 47-49.

- As noted above, AT&T (like the MDOC) incorrectly characterizes a Covad contract as establishing binding obligations rather than non-binding service goals. AT&T August 16 *Ex Parte* Letter at 11 n.38. But beyond that, Qwest also provided unrebutted testimony in Minnesota that in practice Covad was treated no differently from other CLECs, and the contract memorialized Qwest's internal practices and procedures. Qwest Post-Hearing Memorandum at 60-64.

- AT&T points to the so-called "small CLEC" agreement giving certain CLECs in Minnesota the right to request terms of interconnection agreements in other states. AT&T August 16 *Ex Parte* Letter at 8. But AT&T ignores the fact that this provision did not even take effect until March 17, 2002, (by which time Qwest had asked the Minnesota Commission to approve it as an interconnection agreement if appropriate). And in any event, (i) any new Qwest-CLEC agreement arising from this provision would be filed in Minnesota and available to others, and (ii) no party has alleged that Qwest has denied it a term that the "small CLECs" are free to request themselves. Qwest Post-Hearing Memorandum at 65-67.

Qwest could go on. The point is that the Commission should read AT&T's untested allegations of "serious, market-impacting discrimination" with several pounds of salt. Even where it may be found that a particular Qwest-CLEC agreement should have been filed and approved under Section 252, that is not the same thing as finding that any material discrimination has occurred. And, in any event, AT&T has not established such discrimination in the record here, and a Section 271 proceeding is not the appropriate place to litigate the question.

Putting all of these facts together, the Commission can see the forest AT&T tries to obscure: Qwest has regularly been filing interconnection agreements. It has operated in good faith. Questions have arisen only with respect to a relative handful of contracts, and even there the compliance question is muddied because the law with respect to Section 252 is unclear. Furthermore, when evaluating alleged non-compliance, facts are important. For any given contract, it is necessary to understand the actual meaning and application of the contract terms to be sure that it falls within the scope of Section 252(a), let alone to evaluate the material consequences of any filing lapse. Yet AT&T is asking the Commission to leap from the "A" of a few potential Section 252(a) lapses to the "Z" of a broad scale discrimination problem worthy of denying an otherwise sound Section 271 application. The record here simply does not support such a conclusion.

Indeed, the ability of AT&T to weave rhetoric out of a handful of data points is almost breathtaking. Reading AT&T's pleading, one would hardly appreciate that only one State Authority, the Iowa Utilities Board, actually has ruled on "unfiled agreements." In doing so, the IUB established its own standard defining the scope of the Section 252 filing requirement, clarifying the law in that state. The IUB then found that the three Qwest agreements before it should have been filed, but imposed no penalties. The IUB also provided that no penalties would apply if Qwest made a compliance filing submitting any other agreements with CLECs that fell within the Board's announced standard. 106/ Significantly, the Board reached this decision without hearing evidence that Qwest would have provided regarding the factual context of these agreements. (For example, the three agreements the Board found should have been filed included the Covad contracts that, in the Minnesota hearing, Qwest has shown contained targets but not binding commitments, and that in any event did not give Covad any different treatment than Qwest provided other CLECs.) Nevertheless, rather than request such a hearing, Qwest has been content to accept the Board's process for putting this matter behind it. Qwest has made the compliance filing and moved on.

106/ *See* Order Making Tentative Findings, Giving Notice For Purpose of Civil Penalties, and Granting Opportunity to Request Hearing, *In re AT&T Corporation v. Qwest Corporation*, Iowa Utilities Board, Docket No. FCU-02-2 (May 29, 2002).

Qwest notes this background in part to make a few points clear. First, no Commission has found wholesale violation of Section 252(a) by Qwest. Second, and so it is clear, Qwest's decision not to contest the Iowa Board's order should be read in context. Qwest will comply with the Board's newly announced standard, and in the absence of serious penalties for past lapses, has no interest in arguing the legal issue of the scope of Section 252(a) in that context. Qwest is perfectly willing to file any contract a State Authority deems appropriate. But the FCC should not allow AT&T to turn that willingness to resolve matters in Iowa (or any future state), done with express reservation of its position, 107/ into an admission of bad faith misconduct, let alone a basis for denial of Section 271 authority. Rather, it is a sign of Qwest's willingness to comply with any legal authority clarifying the law in this area, just as Qwest has attempted to comply with the Act in the past.

2. State Authorities and the Justice Department Have Unanimously Rejected AT&T's Position

Consistent with AT&T's attempt to obscure the forest, it also ignores all of the decisions of regulatory authorities rejecting its "unfiled agreements" argumentation. Indeed, AT&T ignores the decision of the Iowa Utilities Board rejecting AT&T's petition to delay action on Qwest's 271 application for that state, 108/ even as AT&T tries to emphasize the Board's ruling that Qwest should have filed certain agreements under Section 252. AT&T does not even attempt to argue that the Iowa Board's conclusion was in error. Similarly, AT&T ignores decisions of the eight other commissions whose states are represented in Docket Nos. 02-148 and

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107/ Qwest so qualified its compliance filing in Iowa. *See* Qwest Corporation's Compliance Filing, Iowa Utilities Board Docket No. FCU-02-2, n.2 (filed July 29, 2002).

108/ Order to Consider Unfiled Agreements, *In re U S WEST Communications, Inc., n/k/a Qwest Corporation*, Iowa Utilities Board, Docket Nos. INU-00-2, SPU-00-11 (June 7, 2002) ("Iowa Order to Consider Unfiled Agreements").

02-189. Each of these commissions either expressly rejected motions by AT&T for Section 271 delay based on "unfiled agreements" questions, or otherwise concluded that the unfiled agreements issue was not a basis for denying Qwest Section 271 relief. 109/ Since AT&T filed its *ex parte* letter on August 16, the Oregon Public Service Commission has released its own order reaching the same conclusion. 110/ In short, AT&T is zero for ten in its attempt to convince State Authorities that "unfiled agreements" questions are material here.

This unanimous state view underscores that regulatory authorities understand what the unfiled agreements dispute is, and what it is not. They recognize that Qwest has undertaken the enormous efforts required to open its local markets to competition. They

109/ *See, e.g.*, Order Denying Motion, *In the Matter of the Colorado Public Utilities Commission's Recommendation to the Federal Communications Commission Regarding Qwest Corporation's Provision of In-Region, InterLATA Services in Colorado*, Colorado Public Utilities Comm'n, Docket No. 02M-260T (June 11, 2002); Notice of Commission Action, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Montana Public Service Comm'n, Docket No. D2000.5.70 (June 3, 2002); Motion to Reopen 271 Proceedings Denied, *In the Matter of Qwest Corporation, Denver, Colorado, filing its notice of intention to file Section 271(c) application with the FCC and request for Commission to verify Qwest Corporation's compliance with Section 271(c)*, Nebraska Public Service Comm'n, Application No. C-1830 (June 12, 2002); Transcript of Special Meeting, *U S WEST Communications, Inc. Section 271 Compliance Investigation*, North Dakota Public Service Comm'n, Case No. PU-314-97-193 (June 13, 2002); *accord*, Order on AT&T Motion to Reopen Proceedings, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms*, Wyoming Public Service Comm'n, Docket No. 70000-TA-00-599 (June 18, 2002); Washington Utilities and Transportation Commission ("WUTC"): (1) *39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest* ("39th Supplemental Order"); and (2) *40th Supplemental Order Denying Petition for Reconsideration* ("40th Supplemental Order").

110/ *In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region, InterLATA Services under Section 271 of the Telecommunications Act of 1996, Final Recommendation Report of the Commission*, Public Utility Comm'n of Oregon, Docket No. UM 823 (Aug. 19. 2002), at 18-19 (declining to deny Section 271 relief or delay conclusion of Section 271 proceeding on basis of AT&T allegations).

recognize that the scope of Section 252's mandatory filing requirements has not been clear. And most important, they recognize that any particular lapses in compliance with Section 252 in specific cases are not grounds for discounting the fundamental changes that have occurred in the Qwest markets.

The Justice Department has reached the same conclusion twice. In its evaluation in Docket No. 02-148 the Department stated that "it is not apparent that the remedy for . . . prior violations [of Section 251 or 252], if any, lies in these proceedings rather than in effective enforcement through dockets in which such matters are directly under investigation." DOJ Evaluation, Docket No. 02-148, at 3. Similarly, the Department defers here to the Commission but does not propose that the "unfiled agreements" matter is a basis for withholding Section 271 authority. DOJ Evaluation, Docket No. 02-189, at 3 n.6.

These decisions of the State Authorities and DOJ are fully consistent with the Telecommunications Act. Section 271 proceedings are not the place to resolve legal questions such as which ILEC-CLEC agreements must be filed under Section 252(a), and which do not have to be filed. Similarly, the Commission does not use Section 271 proceedings as a vehicle for enforcement actions, or delay consideration of Section 271 applications while such proceedings are pending. As the Commission has written, "[t]he section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application. . . . [Section 271 proceedings] are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability." 111/

111/ *See SBC Kansas/Oklahoma Order* ¶ 19 (footnotes omitted); *see also SBC Texas Order* ¶¶ 23-27.

Indeed, the United States Court of Appeals for the District of Columbia Circuit expressly rejected AT&T's attempt to convert Bell Atlantic's Section 271 proceeding in New York into the same sort of referendum that AT&T seeks to create here. In agreeing with the FCC that CLECs should not be permitted to raise collateral issues, the court held that the sweeping inquiry AT&T sought would cast the Section 271 process adrift from its statutory moorings:

> The Commission's concerns about encumbering the ninety-day administrative process and prolonging litigation, thus delaying BOC entry into long distance markets, seem well-founded.*** We thus agree with the FCC that allowing collateral challenges could change the nature of section 271 proceedings from an expedited process focused on an individual applicant's performance into a wide-ranging, industry-wide examination of telecommunications law and policy.

AT&T Corp. v. FCC, 220 F.3d 607, 631 (D.C. Cir. 2000). The Commission should take the same approach here. This docket is not the place for the Commission to rule on the scope of the filing requirement under Section 252(a). That legal issue should be left to careful consideration in the context of Qwest's pending rulemaking petition.

Similarly, this is not the proceeding for the Commission to prejudge the outcome of pending proceedings regarding specific Qwest-CLEC contracts being litigated at the state level. To date only one decision has been rendered on this topic - the Iowa Board's conclusion that three specific Qwest agreements should have been filed. As noted, Qwest did not seek a hearing or further review of that decision given the Board's conclusion that, if Qwest complied with the new standard it announced, no penalties would apply. This is hardly the kind of decision that provides a basis for the Commission to deny a Section 271 application.

While this Commission has said (in the *only* paragraph of FCC authority that the other parties or their witnesses have ever cited on this subject) that it is "interested in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations," *Ameritech Michigan Order* ¶ 397, it has made just as clear (indeed, in the very next sentence) that it is not interested in such misconduct for its own sake. Rather, such evidence is relevant only insofar as it "would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority." 112/ The unfiled agreements dispute – which involves a good-faith question of the proper interpretation of section 252's filing obligations – does not in any way overshadow the voluminous record evidence here that Qwest's local markets are open to competition now and would remain so after a grant of Qwest's application. The unanimous State Authority decisions rejecting AT&T's delaying tactics, and the corresponding views of the Justice Department, are fully consistent with this precedent.

B. In Any Event, Qwest's Voluntary Filing Actions Eliminate Any Going-Forward Section 271 Issue

Qwest trusts that the Commission will recognize the forest before it, notwithstanding AT&T's distortion of the facts. Qwest strongly submits that the "unfiled agreements" issue is a red herring that AT&T presents with such vehemence only because it has so little to say in the face of Qwest's extensive market-opening activities, and the extraordinary work of the ROC and State Authorities to test and review Qwest's efforts in that regard. The record contains no evidence actually to support AT&T's claims of broad scale discrimination.

112/ *Id. See also* Facilitator's Public Interest Report at 9 (finding that "the public-interest standard" is not "a punitive one, but rather a forward looking, or predictive one"); Workshop 4, Part 2, Findings and Recommendation Report of the Commission and Procedural Ruling, *In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region, InterLATA Services under Section 271 of the Telecommunications Act of 1996,* Oregon Public Utility Comm'n, Docket No. UM 823 (Jun. 3, 2002) at 46 (finding that "[t]he public interest test is prospective in nature").

In any event, this matter is now moot even as a theoretical matter. The Commission can look to recent actions Qwest has taken to eliminate dispute regarding this matter pending a ruling on its Petition for Declaratory Action pending at the FCC. These actions ensure that, to the extent debate continues regarding the unfiled agreements issue (both as to the generic legal standard applicable to all ILECs and CLECs, and as to application of the standard in particular cases), that debate - in the case of Qwest - will relate only to past events. Thus, even assuming that final regulatory orders conclude that Qwest made past errors in its filing decisions, the Commission can find that such past errors do not make the local markets in the states here any less open now or in the future.

Indeed, these actions by Qwest entirely moot AT&T's discrimination complaints. AT&T argues that Qwest has not met its burden to prove that it is providing non-discriminatory access to checklist items because some of its agreements with CLECs have not been filed. AT&T August 16 *Ex Parte* Letter at 3. This is no longer the case. As a result, it is all the less relevant whether any of the CLEC contracts should have been filed in the past, or whether the impact of such non-filing could in any way be deemed to have a discriminatory effect.

First, Qwest has implemented new policies and procedures that are applicable to all new contracts with CLECs. Specifically, while Qwest's Declaratory Ruling Petition is pending, the company has voluntarily committed to file with the states all future contracts, agreements, and letters of understanding negotiated with CLECs that create obligations in connection with Sections 251(b) or (c). 113/ Qwest believes that this "all obligations" standard is overbroad, and that Section 252(a) does not require filing and prior State Authority review and approval of any and all obligations agreed to between an ILEC and a CLEC. For example, regulatory approval should not be required for carrier-specific implementation details related to provisioning, Qwest-CLEC relationship management issues (such as meeting schedules and dispute resolution processes) and the like. Nevertheless, pending FCC action, Qwest will not draw lines in this area.

Second, Qwest has established a committee of senior managers (at the Executive Director level and above) to enforce compliance with this policy and any order the Commission issues on the subject. This committee meets on a regular basis (recently weekly) to review and determine whether Qwest must file particular agreements with state regulators. Brotherson Declaration ¶ 8.

Third, Qwest has taken steps to make available terms of older contracts in all of the states at issue here. As Qwest explained in a recent *ex parte* submission, 114/ the company naturally has been concerned about its potential penalty liability with regard to second-guessing of its past filing decisions in an area where the standards have not been clearly defined. Qwest has no objection to offering all CLECs in a state the same going forward terms it gives under contract to one local carrier. However, Qwest does not concede that all contracts with CLECs require prior approval, and has been concerned that extending such offers might be read as an admission regarding the scope of Section 252's mandatory filing requirements.

That said, Qwest stated in its Reply Comments in Docket No. 02-148 that it would post on its website all contracts with CLECs in states where it had Section 271 applications pending insofar as those contracts contained effective going forward obligations

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113/ These matters are described in the declaration of Mr. Larry Brotherson provided in Qwest's Reply Comments in Docket No. 02-148, and incorporated herein by reference.

114/ *See Ex Parte* Letter of Melissa Newman, CC Docket Nos. 02-148 and 02-189, filed Aug. 20, 2002.

related to Section 251(b) and (c). Qwest also stated that it would make available such going forward terms to other CLECs under the same polices that apply under Section 252(i). *See* Qwest Reply Comments, Docket No. 02-148, at 131-32.

After additional consideration, Qwest is now taking a further step as a sign of its good faith by filing all such agreements under Section 252(e) in addition to posting them on its website. Specifically, Qwest has reviewed all of its currently effective agreements with CLECs in the Docket No. 02-148 and 02-189 states that were entered into prior to adoption of the new review policy described above. Qwest already had filed appropriate agreements with the Iowa Utilities Board in accordance with the Board's recent order. Qwest has now filed in the remaining eight states all such agreements that include provisions creating on-going obligations that relate to Section 251(b) or (c) which have not been terminated or superseded by agreement, commission order, or otherwise. Qwest is asking the respective commissions in these states to approve the agreements such that, to the extent any active provisions of such agreements relate to Section 251 (b) or (c), they are formally available to other CLECs under Section 252(i). In conformance with the structure of Section 252, including the state-specific approval process, opt-in opportunities will be provided on a state-specific basis under Section 252(i) rather than on a region-wide basis. 115/

We are not asking the state commissions to decide whether any of these contracts, or specific provisions therein, in fact are required to be filed under Section 252 as a matter of law. The state commissions need simply approve those provisions relating to Section 251(b)

115/ For the state commissions' benefit, Qwest is marking, highlighting or bracketing those terms and provisions in the agreements which Qwest believes relate to Section 251(b) or (c) services, and have not been terminated or superseded by agreement, commission order, or otherwise. This should reduce the confusion that could otherwise arise given that these contracts or (c) under their Section 252(e) procedures, and Qwest will make the going forward provisions related to Section 251(b) or (c) available under Section 251(i). Thus, the state commissions may but need not at this time reach a legal interpretation of Section 252(a), or decide when the 1996 Act makes a filing mandatory, and when it does not. (The Iowa Board has previously made its own ruling on this question. As discussed above, Qwest has indicated that it does not agree with the determination, but is complying with it.) 116/

Qwest is requesting that the state commissions approve the agreements as soon as reasonably practicable. Qwest has reserved its rights to demonstrate that one or more of these agreements need not have been filed in the event of an enforcement action in this area. Meanwhile, however, Qwest will offer other CLECs any terms in effect for the benefit of the contracting CLEC pursuant to the polices and rules related to Section 251(i). (Provisions that do not relate to Section 251, that settle past carrier-specific disputes, or that are no longer in effect are not subject to Section 251(i) and this offering.) Should a state commission later conclude that a particular agreement did not have to be filed as a matter of law under Section 252, Qwest nevertheless will honor "opt-in" contracts made with CLECs prior to that decision. However, Qwest necessarily will reserve the right to terminate an "opt-in" arrangement (as well as the interconnection-related provision in the contract with the initial customer) in the unlikely event

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were not prepared as interconnection agreements, sometimes cover multiple subjects, and are of various ages.

116/ Qwest is not filing for state commission approval its contracts with CLECs that do not contain provisions that relate to Section 251(b) or (c), or contain provisions relating to Section 251 that have been terminated or superseded by agreement, commission order, or otherwise. Qwest also is not filing routine day-to-day paperwork, settlements of past disputes, stipulations or agreements executed in connection with federal bankruptcy proceedings, or orders for specific services. Included in this last category are contract forms for services already provided for in approved interconnection agreements, such as signaling and call-related databases. (Parties may execute a form contract memorializing the provision of such services offered as described in the interconnection agreement.)

that a state commission finds both that the originally filed contract is of the type that must be filed under Section 252, and that the particular term is not in the public interest. 117/

Consistent with the discussion in its Docket No. 02-148 Reply Comments, Qwest also is posting the filed agreements on the website it uses to provide notice to CLECs and announcing the immediate availability of the effective interconnection-related terms and conditions in the respective states. This will facilitate the ability of CLECs to request terms and conditions prior to the state commission's decision approving the filed agreements. Qwest also will be sending CLECs operating in the states a general advisory notice that they can look to the website for this information (through regular procedures for such notices). Qwest will remove an agreement from its website when it has expired, when none of the terms remaining in effect create ongoing obligations as to matters related to Section 251 (b) and (c) of the Telecommunications Act, or in the event that a state commission concludes that the agreement is not subject to Section 252(a).

Qwest has taken these actions as a good faith gesture pending further clarification by this Commission of the scope of Section 252(a). Qwest does not concede that any of the affected agreements are of the kind that require prior filing and state commission approval.

117/ Qwest is filing the relevant CLEC agreements in full, subject to the following actions intended to protect CLEC interests given the confidentiality provisions contained in some of these agreements and the fact that the CLECs involved may deem the information contained therein confidential. First, Qwest is redacting those contract terms that relate solely to the specific CLEC and do not create ongoing obligations, such as confidential settlement amounts relating to resolution of historical disputes between Qwest and the particular CLEC, confidential billing and bank account numbers, particular facility locations, and CLEC end user customer information. Second, Qwest is asking state commissions to hold the submitted agreements under seal for a short period of time to allow the affected CLECs sufficient time to object to their public disclosure (except those that have been made public to date). Qwest is concurrently notifying the CLEC parties to the non-public agreements of this filing and advising them of their opportunity to submit any objections regarding public disclosure to the state commission.

Qwest continues to believe that Congress did not intend all ILEC-CLEC contractual arrangements with a nexus to Section 251 to be formally filed for review, let alone those contracts that do not relate to Section 251 obligations. However, until the FCC rules on the matter, we will follow the course outlined above.

In these circumstances, AT&T's red herring is a dead herring. For the reasons discussed above, Qwest submits that the record in this proceeding overwhelmingly demonstrates that its local markets are open to competition, and that the State Authorities and Justice Department were correct in concluding that residual disputes over the scope of Section 252(a) and particular Qwest contracts do not provide a basis for denying grant of Qwest's pending Section 271 applications. But this is all the more true when such disputes relate only to whether past contractual obligations should have been filed.

Qwest continues to believe that, after Section 252(a) filing standards are defined and its specific contracts reviewed, its past filing decisions will be found reasonable, and at the least in good faith. But for present purposes, this case is no different from the one addressed by the Commission in its *BellSouth Georgia/Louisiana Order.* In that proceeding two CLECs claimed that a BellSouth interconnection policy violated the CLECs' "rights to interconnect 'at any technically feasible point' within BellSouth's network," and that, as a result, the BOC had not satisfied its obligations under checklist items 1 and 9. *BellSouth Georgia/Louisiana Order* ¶ 207. The Commission rejected the CLECs' argument because (a) the BellSouth policy at issue had been rescinded, *id.* ¶ 208, (b) a Section 271 docket was not the place "to settle new and unresolved disputes about the precise content of an incumbent LEC's obligations to its competitors," *id.* (citing *SBC Kansas/Oklahoma Order* ¶ 19), and (c) the issue concerned matters

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Absent other state rules, Qwest is requesting that this confidentiality period be limited to seven "open . . . before [the] Commission" in another docket. *Id.* All of these considerations counsel in favor of resolving the "unfiled agreements" litigation in the dockets devoted to those issues, rather than delaying Qwest's 271 approval to consider those issues here.

In short, the State Authorities and the Justice Department have got the so-called "unfiled agreements" issue right. Whatever its significance proves to be as pending proceedings go forward, the record in no way supports delaying action under Section 271 here.

C. Qwest's Performance Results Are Not Impacted by the "So-Called "Unfiled Agreements," Notwithstanding AT&T's Suggestions to That Effect

1. AT&T Distorts the Conclusions of KPMG and Ignores Actual Commercial Performance

AT&T also claims that the so-called "unfiled agreements" somehow taint the results of the ROC OSS Test. *See* AT&T August 16 *Ex Parte* at 10. But this argument completely ignores the record evidence in this proceeding and KPMG's testimony in recent state Section 271 proceedings.

AT&T first tries to set up a straw man by claiming that Qwest relies "almost entirely" on the results of the ROC OSS Test to demonstrate that its OSS complies with Section 271. *Id.* But this completely ignores thousands of pages of evidence submitted in this proceeding demonstrating that Qwest provides CLECs with nondiscriminatory access to its OSS on a commercial basis. Nearly half the PIDs that were developed to assess Qwest's commercial performance pertain to OSS. As Qwest has demonstrated repeatedly, its performance in the Application states under those PIDs has been extremely strong. See OSS Reply Decl. ¶ 5 n.1-2. The premise of AT&T's argument – that Qwest must rely almost exclusively on results of the ROC OSS Test – therefore is completely false.

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days.

AT&T next tries to disparage KPMG and the ROC OSS Test by claiming that the so-called "unfiled agreements" diminish the credibility of the Test's results. *See* AT&T August 16 *Ex Parte* at 10-11. This too ignores the evidence in this proceeding and in state Section 271 proceedings.

It is now well-understood that KPMG, on its own initiative, performed an analysis to determine whether any unfiled contracts between Qwest and CLECs affected its findings in the ROC OSS Test. This analysis – which is referred to as the "CLEC Participation Study" – was first issued by KPMG on May 7, 2002. In that initial release, KPMG stated that it had examined the impact that agreements with Eschelon, McLeod and Covad ("the three CLECs") may have had on Qwest's performance during the ROC OSS Test. In response to the May 7 CLEC Participation Study, WorldCom asked KPMG to expand the scope of its analysis to include eight additional CLECs that had agreements with Qwest. KPMG complied, and on June 11, 2002, it issued a revised CLEC Participation Study.

AT&T tries to make much of the fact that KPMG stated in the May 7 Study (and affirmed in the June 11 Study) that it "makes no assertion as to whether or not the information received from the three CLECs is representative of the 'typical' CLEC experience." AT&T August 16 *Ex Parte* at 10, citing May 7 CLEC Participation Study at 1. But this has nothing to do with whether KPMG found that the agreements with these CLECs affected its findings in the ROC OSS Test. KPMG's most salient statement on point appears in the June 11 Study, in which KPMG states that it "is not aware of any evidence that suggests that Qwest has given preferential treatment to any of the participating CLECs in a manner that would undermine the credibility of the information relied upon by KPMG Consulting" during the Test. June 7 CLEC Participation Study at 1.

AT&T wrongly – and inappropriately – characterizes this statement as an attempt by KPMG "to mitigate" the impact of its assertion regarding the representative nature of the information it examined in the CLEC Participation Study. As an initial matter, KPMG acted as an independent evaluator of Qwest's OSS. To suggest that KPMG had to "mitigate" its statement therefore is misleading, as KPMG's role required that it present clear and supported conclusions with regard to Qwest's OSS. Moreover, there is nothing for KPMG to "mitigate." The first statement cited by AT&T – regarding the representative nature of the information KPMG examined –merely states a fact. But KPMG's finding that there was no evidence that any unfiled agreement affected the validity of the ROC OSS Test represents KPMG's *conclusion.*

A close reading of the CLEC Participation Study demonstrates conclusively that unfiled agreements did not have – and could not have had – any impact on the ROC OSS Test that is relevant to this proceeding. As explained more fully below, AT&T's central premise – that unfiled agreements resulted in favorable treatment for certain CLECs – is false. But, even if that premise were true, such favorable treatment could not have had a measurable effect on KPMG's conclusions because KPMG "substantially relied" on data from CLECs that supposedly received such favorable treatment in only four (out of 685) evaluation criteria. For each of these four criteria, the record is replete with other evidence - actual commercial performance - demonstrating that Qwest is meeting its Sections 251 and 252 (and by extension, its Section 271) obligations.

The four evaluation criteria that KPMG placed in the "substantial reliance" category were 14-1-9, 14-1-21, 14-1-25 and 14-1-27. In the first, 14-1-9, KPMG observed Qwest technicians as they provisioned line sharing LSRs submitted by Covad to verify that the Qwest technicians "adher[ed] to documented method[s] and procedure[s]" and that "the loop characteristics met the technical specifications for the intended service." See June 11 CLEC Participation Study at 8 ("Substantial Reliance" Chart). It defies logic for AT&T to suggest that unfiled agreements could have affected KPMG's observation and evaluation of Qwest's technicians in this area, as their overall performance has nothing to do with any unfiled agreements that may have existed.

The remaining evaluation criteria KPMG placed in the "substantial reliance" category (14-1-21, 14-1-25 and 14-1-27) all pertain to whether test orders submitted met the benchmarks or parity standards under OP-3 (Installation Commitments Met) or OP-4 (Average Installation Interval). But, as demonstrated in the Williams Reply Declaration, ¶¶ 52, 56, substantial evidence exists to demonstrate that Qwest is meeting OP-3 and OP-4 on a commercial basis. The FCC has repeatedly held that "[t]he most probative evidence that OSS functions are operationally ready is actual commercial usage." *See, e.g., Maine Section 271 Order* at App. D-15. Thus, even if unfiled agreements affected KPMG's analysis of OP-3 and OP-4 (which they did not), additional evidence exists to support the presumption that Qwest can – and is – meeting those metrics.

Having failed in its attempt to discredit KPMG with respect to the evaluation criteria in the "substantial reliance" category, AT&T next tries to obscure KPMG's findings in connection with the criteria in the "partial reliance" category. But, as KPMG itself has acknowledged:

> Partial reliance meant some of our record was based upon data or information interviews or something that we had with one of those three CLECs, but that the bulk of our conclusions were based upon other materials that we had gathered directly. And in point of fact, if you took out all of that information provided by those CLECs, it wouldn't change our conclusions at all.

See Attachment 5, Appendix K, Wyoming Transcript, July 13, 2002, at 181. Thus, for the evaluation criteria on which KPMG "partially relied" with respect to CLEC-specific information, that information is irrelevant to KPMG's overall finding of compliance in the ROC OSS Test.

Ultimately, having failed in its attempt to mischaracterize the CLEC Participation Study, AT&T tries to supplant KPMG's judgment with its own by comparing KPMG's reliance on CLEC-specific results generated by McLeod, Eschelon and Covad with the terms of their unfiled agreements with Qwest. *See* AT&T August 16 *Ex Parte* at 11. AT&T's implicit suggestion that the Commission should defer to AT&T's back-of-the-envelope analysis rather than KPMG's three-year, comprehensive study of Qwest's OSS is absurd.

2. CLEC-Specific Data Demonstrate That AT&T's Speculation Regarding Discrimination is Not Occurring in Reality

AT&T's discrimination argumentation also can be dismissed by examination of actual CLEC-specific performance data. AT&T focused on unfiled agreements with three CLECs – Covad, Eschelon and McLeod – as especially relevant due to the CLECs' size. AT&T Comments at 19. AT&T then makes two performance allegations: (1) that Covad obtained preferential firm order confirmations (FOCs) that allowed it to obtain "superior access to UNEs to the competitive detriment of all others;" and (2) that Qwest made it easier for certain CLECs to submit orders such that certain "CLECs may have skewed [the OSS Test] results." These allegations are based on speculation, not actual data.

In the same pleading, however, AT&T acknowledges that "Qwest's own performance data…is the most probative evidence of whether Qwest is meeting its OSS obligations . . . ." AT&T Comments at 29. However, Qwest's performance data, the very data AT&T acknowledges is the "most probative," show that the CLECs who entered into unfiled agreements with Qwest do not receive preferential treatment in ordering, provisioning and repair of UNEs.

This matter is discussed in the Williams Reply Declaration and the confidential CLEC-specific data that accompany it. Specifically, Qwest has gathered data from the four products ordered most prevalently by these CLECs: (1) analog loops; (2) 2-wire non-loaded loops; (3) UNE-P POTS; and (4) UNE-P-Centrex. For each of these products, Qwest tracked flow through rate (PO-2b), the percentage of commitments met (OP-3), the average installation interval (OP-4), and the overall trouble rate (MR-8). Collectively, these data points are the key measures that, if AT&T's allegations had merit, would show better treatment for these CLECs. However, the data simply do not bear this out.

In Confidential Exhibit MGW-1, Mr. Williams presents (1) a summary document showing how Qwest performed for each of these CLECs vis a vis all other CLECs; (2) the actual level of performancc that Qwest provided to these individual CLECs as compared to all other CLECs collectively; and (3) the overall order volumes that the CLEC represents in each state for each product. The data on these charts come directly from the CLEC specific performance reports, which are already a part of the confidential record in this docket. Focusing on the six most recent months (January - June 2002) for the states of Colorado, Iowa, Idaho, Nebraska and North Dakota, the data show that :

- Eschelon had 21 months with better data than other CLECs, 22 months with worse data, and 34 months with equivalent data.
- Covad had 19 months with better data than other CLECs, 6 months with worse data, and 32 months with equivalent data.
- McLeod had 126 months with better data than other CLECs, 120 months with worse data, and 346 months with equivalent data.

Thus, aggregating the three CLECs together, they had 166 months with better data, 148 months with worse data, and 412 months with equivalent data. This is exactly the kind of randomness one would expect to see for any group of CLECs. The data clearly show that CLECs with unfiled agreements did not receive preferential treatment in the ordering, provisioning and repair of UNEs.

In short, for all of AT&T's speculation and innuendo, the reality is that there is no evidence that the so-called "unfiled agreements" issue undercuts Qwest's strong showing that it provides non-discriminatory OSS to all CLECs. Again, the agreements are a red herring. They did not impact the reliability of the KPMG OSS test. And they do not result in preferential treatment.

D. The Record Here is More than Adequate

Finally, the Commission should reject AT&T's attempt to argue that the voluminous record here is somehow incomplete. Qwest has demonstrated that, based on an exhaustive checklist workshop process, where AT&T participated in full along with other CLECs, it beyond question is meeting its obligations under Section 251. No party can contest that local exchange competition is active in these states. No party can fairly argue that the KPMG test was not the most thorough review of OSS that has been conducted in the nation. And the record established in the performance data speaks for itself in demonstrating that Qwest's markets are open.

Qwest takes strong exception to AT&T's gross accusations of "silencing" CLECs. Qwest has done nothing of the kind. First of all, the record in this proceeding demonstrates active CLEC participation across a broad range of issues. It goes without saying that the CLECs are independent companies that can make up their own minds as to when they want to participate in a proceeding and when they do not.

Second, AT&T cannot make something sinister out of a decision by a particular CLEC that it would prefer to resolve disagreements with Qwest through informal dispute resolution processes, rather than through public proceedings. Indeed, such carrier-to-carrier discussions can be much more efficient. Nothing in any Qwest-CLEC contract prohibited any CLEC from responding to government inquiries.

Third, AT&T is being hypocritical. It too routinely makes decisions as to when to expend the resources to participate in a regulatory proceeding and when not to do so. Indeed, one of the so-called "secret deals" at issue in the Arizona proceeding is an agreement between AT&T and U S WEST to settle certain disputes, leading AT&T to withdraw from participating in that proceeding. As part of that settlement AT&T demanded that Qwest decline from participating in certain regulatory proceedings of importance to AT&T. 118/

In short, there is no requirement that CLECs participate in Section 271 proceedings. CLECs will do so when it serves their self-interest. What is relevant here is that, thanks to the comprehensive work of the state commission staffs, Qwest's satisfaction of the requirements of Section 271 are fully and completely documented in this record.

118/ Staff of the Arizona Corporation Commission, *Report and Recommendation in the Matter of Qwest Corporation's Compliance With Section 252(e) of the Telecommunications Act of 1996* (Docket No. RT-00000F-02-0271), at 19 (June 7, 2002).

CONCLUSION

The local exchange market in each of the application states is demonstrably open to competition. Qwest has satisfied its statutory checklist obligations and otherwise complied with the requirements of the 1996 Act, and it will continue to do so in the future. Its entry into the interLATA market in each of Montana, Utah, Washington and Wyoming will fulfill the promise of competition for all the residents of these states.

Accordingly, for all the reasons stated herein and in its opening brief, Qwest's Consolidated Application should be granted.

Respectfully submitted,

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